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IN THE

Supreme Court of the United States

October Term, 1972

NO. 72-1045

BIBLE BAPTIST CHURCH, *Petitioner*,

versus

CHARLES IRELAND, F. H. ALSOBROOK, and CHARLES A. RIDENOUR, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioner, Bible Baptist Church, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, entered in this proceeding on April 27, 1972.

OPINION BELOW

The judgment of the trial court, the 60th District Court of Jefferson County, Texas is printed in Appendix A to this petition (pp. 9-12, *infra*). The opinion of the Court

of Civil Appeals for the Ninth Supreme Judicial District of Texas is reported at 480 S.W.2d 467, and is printed in Appendix B to this petition (pp. 13-26, *infra*).

JURISDICTION

The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont was entered on April 27, 1972, a timely motion for rehearing was denied on May 18, 1972. (see Appendix C, p. 27, *infra*). The Supreme Court of Texas denied a timely-filed application for a writ of error on October 4, 1972 (Appendix D, p. 28, *infra*), and a motion for rehearing was denied November 1, 1972 (see Appendix E, p. 29, *infra*), and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment prohibits judicial enforcement by state court of restrictive deed covenant against the building of a church and the holding of church services.

STATEMENT OF THE CASE

Petitioner, Bible Baptist Church, an independent Baptist church with a congregation of several hundred people, owns land in the incorporated city of Beaumont, Texas, in a subdivision of said city, where the landowners hold title by deeds which specify that:

> "No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one single-family dwelling not to exceed

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two and one-half stories in height and appropriate garage for not more than two cars."

The deed by which petitioner holds is encumbered by such restrictions by reference.

Petitioner moved two buildings onto the land in April 1971 and began using them for church services. Suit in the district court was brought by three land owners of the subdivision to enjoin Bible Baptist Church from using its lands for church purposes and to compel the removal of the buildings.

Petitioner, in its first amended original answer asked the court to deny the relief sought on the grounds that the property is being used for the sole purpose of worship and church purposes, and that a denial of the right to use such premises for such purposes of worship would be a denial of freedom of worship in violation of the First and Fourteenth Amendments to the Constitution of the United States.

The trial court, holding that no jury issue had been presented, gave judgment to respondents (Appendix A) granting the injunction against improving, using or occupying petitioner's land for church purposes, but refused to order removal of the present church structures.

Each respondent testified, in substance, that the presence of the church had not actually disturbed him in the occupancy of his home, nor did any respondent contend that he had suffered actual monetary damage by reason of its presence. Each feared that if the restrictions were not maintained, the area would depreciate in value by other non-complying uses being made of this and other lots in the addition (Appendix B, p. 15, paragraph 3).

Bible Baptist Church filed supersedeas appeal bond, permitting the continuation of worship on the premises and perfected its appeal. Respondents appealed the portion of the trial court judgment denying mandatory removal of buildings.

Bible Baptist Church perfected its appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas and in its third point of error in said brief, preserved its objection to the action of the trial court as being an unconstitutional infringement of the Fourteenth Amendment right to freedom of religion and freedom of worship. The Court of Appeals on April 27, 1972, by written opinion (Appendix B), overruled these contentions and also ruled that the church structures be ordered removed, which order supersedeas bond stays.

In its motion for rehearing in the Court of Civil Appeals, Bible Baptist Church carried forward its objection to the unconstitutional action of the trial court in granting and the Court of Civil Appeals in upholding the granting of the injunction prohibiting church use in violation of the right to worship as guaranteed by the Fourteenth Amendment. Motion for rehearing was denied May 18, 1972.

Petitioner thereupon filed its application for Writ of Error in the Supreme Court of Texas, charging in its third point of error that "the Court of Civil Appeals erred in affirming the judgment of the trial court enjoining the church from using its property for church purposes and further erred in reversing the trial court and granting mandatory injunction because such rulings violated the First and Fourteenth Amendments to the Constitution of the United States of America and denied Bible Baptist

Church freedom of religion and freedom of worship." On October 4, 1972, the Supreme Court of Texas refused application for Writ of Error, finding no reversible error.

Petitioner's timely-filed motion for rehearing with the Supreme Court of Texas, restated and preserved the constitutional question in its third point of error. The Supreme Court of Texas, on November 1, 1972, overruled motion for rehearing and petitioner herenow, within 90 days from the last ruling of the Supreme Court of Texas, files its Petition for Certiorari in the Supreme Court of the United States.

REASON FOR GRANTING WRIT

The right to build churches and to use the same for church purposes is implicit in the constitutional guarantee of religious freedom, *Congregation Committee, etc. v. City Council,* 287 S.W.2d 700. We quote from the opinion:

> "To deny the (building) permit . . . would not only prevent the use of the church but would restrict the right of freedom of worship and assembly to an extent that outweighs any benefit to the safety, health, morals and general welfare of the public. In a situation like this, the police power must yield to the constitutional right of freedom of worship and assembly."

Having thus established the right to build and use a church *as a constitutional right,* we move to the question of whether this constitutional right shall prevail, or shall give way to the state action by which a state court at-

tempts to enforce the provisions of a restrictive deed covenant prohibiting church construction and church services on land owned by the church.

In appellant's brief filed in the Court of Civil Appeals we cited *Shelley v. Kraemer,* 334 U.S. 1, 92 L.Ed. 1161, 3 A.L.R.2d 441 (1948) wherein judicial enforcement by a state court of a restrictive covenant was held to be unconstitutional under the 14th Amendment to the U. S. Constitution because it constituted "discriminatory action on the part of the state based on consideration of race or color."

Although the Court of Civil Appeals states that no reliance can be placed on *Shelley* because it deals with discrimination, we have cited *Shelley* to demonstrate that a constitutional right is superior to state action which prevents the enjoyment of that right. While the rights themselves are different, in *Shelley* freedom from discrimination based on race or color, and in *Bible Baptist* freedom of religion, both are of constitutional stature. *Shelley* is protected by the equal protection clause of the Fourteenth Amendment, *Bible Baptist* by the due process clause. In *Palko v. Connecticut,* 302 U.S. 319, 82 L.Ed. 288, the Supreme Court decreed as follows: "The due process clause of the Fourteenth Amendment makes it unlawful for a state to abridge . . . the free exercise of religion. *Hamilton v. University of California,* 293 U.S. 245; *Pierce v. Society of Sisters,* 268 U.S. 510."

It is thus apparent that the First Amendment guarantee of freedom of worship has been incorporated into the Fourteenth Amendment thereby protecting the right against adverse state actions.

We think this is a case where a state court has decided a federal question of substance not theretofore determined by this Court. We do not think it necessary to belabor the Court with statistics showing the number of churches in our urban and suburban areas, nor the increase in areas covered by restrictive covenants.

The interests in conflict on the side of the restrictive covenant: The possible protection of the homestead as a valuable investment, and some assurances against disturbances by church services. On the side of freedom of religion we have all of those benefits attributed to the influence of religion by the signers of the constitution.

If those benefits are to be realized by the people, surely it must be preached and taught where the people live.

CONCLUSION

For these reasons, the Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont.

Respectfully submitted,

PHILLIP BORDAGES
2860 Park Street
Beaumont, Texas 77701

Attorney for Petitioner

IN THE

Supreme Court of the United States

October Term, 1972

NO._____

BIBLE BAPTIST CHURCH, *Petitioner,*

versus

CHARLES IRELAND, F. H. ALSOBROOK, and CHARLES A. RIDENOUR, *Respondents*

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 1973, three copies of the Petition for writ of Certiorari were mailed, postage prepaid, to Dale Dowell, Beaumont Savings Building, Beaumont, Texas 77701, Counsel for the Respondent. I further certify that all parties required to be served have been served.

PHILLIP BORDAGES
2860 Park Street
Beaumont, Texas 77701

Attorney for Petitioner

APPENDIX A

NO. B-96248

CHARLES IRELAND, ET AL

v.

BIBLE BAPTIST CHURCH

IN THE DISTRICT COURT
OF
JEFFERSON COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 1st day of November, 1971, came on for trial the above styled and numbered cause, wherein Charles Ireland, F. H. Alsobrook and Charles A. Ridenour are plaintiffs and Bible Baptist Church, a nonprofit corporation organized and existing under the laws of the State of Texas, is defendant; whereupon, all parties having announced ready for trial, a jury was duly impaneled and sworn, consisting of twelve good and qualified jurors, the pleadings were read, the evidence was introduced and all parties rested on the 3rd day of November, 1971, at which time the plaintiffs presented to the Court their Motion for Instructed Verdict, which said motion the Court granted because the undisputed evidence shows as a matter of law that to allow this defendant to use or improve as a church or for chuch purposes any or all of the lands and premises in question would be in contravention of and would constitute a breach and violation of the following restrictions as per map, dedication and restrictions of record in Vol. 7,

Page 97, Map Records of Jefferson County, Texas, and Vol. 746, Page 65, et seq., Deed Records of Jefferson County, Texas, to-wit:

> "1. All Lots in the tract shall be known and described as residential lots, except Lot One (1) in Block One (1). No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height, and a private garage for not more than two cars."

All to the irreparable damage and injury of said plaintiffs, of which they have no adequate remedy at law.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that the defendant, Bible Baptist Church, its officers, agents, servants, employees be, and they are hereby, now permanently enjoined from, and that they shall desist from, either improving, using or occupying for the purposes of a church in violation, breach and contravention of the aforesaid restrictions, either express or implied, the following lots, lands and premises situated and located in the Lakeview Terrace Addition to the City of Beaumont, Jefferson County, Texas, to-wit:

TRACT ONE

Lots Nine (9) and Ten (10), Block Two (2) Lakeview Terrace Addition, SAVE AND EXCEPT, a strip of land 15 ft. wide off of the rear or S.W. end of Lot 9 and a strip of land 15 ft. wide off of the rear or S.W. end of the N.W. 25 ft. of Lot 10, being those strips of land which were heretofore conveyed to Ellis Droddy and J. Bain Price, Jr. by

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deeds dated June 17, 1954, recorded in Vol. 940, Pages 34 and 40, respectively, of the Deed Records of Jefferson County, Texas, subject to all reservations, restrictions, easements and covenants of record affecting said property.

TRACT TWO

That certain tract of land lying immediately South of Lot 10, Block 2 of the Lakeview Terrace Addition to the City of Beaumont, as per map or plat of said addition of record in Vol. 7, Page 97, Map Records, Jefferson County, Texas, beginning at a point where the South boundary line of said Lot 10, Block 2 of the Lakeview Terrace Addition to the City of Beaumont, Texas, intersects the Westerly boundary line of U. S. Highway No. 69 a distance of 89.26 ft. for corner; THENCE South 67 deg. 30 min. West 209.57 ft. for corner which has a perpendicular distance of 200 ft. from the West boundary line of U. S. Highway No. 69; THENCE in a N.W. direction a distance of 24.56 ft. for corner, being also the S.W. corner of Lot 10, Block 2 of the Lakeview Terrace Addition; THENCE North 49 deg. 2 min. East 200 ft. to place of beginning, containing .261 acres of land, more or less,

and in particular with the restrictions that said lots, lands and premises be neither improved, used nor occupied for any purpose other than for residence purposes.

And it appearing to the Court as a matter of law that the church structures presently on and upon the above described premises are not on and upon said premises in violation of any of said restrictions of record at Vol. 746, Page 65, et seq., Deed Records of Jefferson County, Texas, it is ORDERED, ADJUDGED and DECREED

by the Court that the plaintiffs, Charles Ireland, F. H. Alsobrook and Charles A. Ridenour, be and they are hereby denied, as against the defendant, Bible Baptist Church, a decree requiring the removal of all present church structures upon said premises.

And it further appearing to the Court that the cross-action asserted herein by the defendant, Bible Baptist Church, against the plaintiffs is not well taken, it is ORDERED, ADJUDGED and DECREED that the defendant, Bible Baptist Church, take nothing of and against the plaintiffs, Charles Ireland, F. H. Alsobrook and Charles A. Ridenour, upon its cross-action asserted against them herein and that they go hence without day.

It is further ORDERED, ADJUDGED and DECREED by the Court that the plaintiffs do have and recover of and from defendant all costs in this behalf expanded, for all of which let writs of injunction and execution issue.

Any other relief not expressly granted herein is hereby in all things denied.

To all of which, in open court, the plaintiffs and defendant duly excepted and gave notice of appeal to the Court of Civil Appeals for the Ninth Judicial District sitting at Beaumont.

SIGNED, RENDERED and ENTERED this the 22nd day of November, A. D. 1971.

/s/ HAROLD CLAYTON
District Judge Presiding

APPENDIX B

NO. 7343

CHARLES IRELAND, ET AL., *Appellant-Appellee*

v.

BIBLE BAPTIST CHURCH, *Appellee-Appellant*

(Filed April 27, 1972)

Plaintiffs below, Ireland, et al, brought suit to enjoin the defendant, Bible Baptist Church, from using certain lands for church purposes contending that such use violated the deed restrictions in the addition. Plaintiffs also sought a mandatory injunction to compel the removal of two frame structures placed thereon by the defendant. At the conclusion of the evidence, the trial court granted plaintiffs' motion for a peremptory instruction and entered judgment enjoining the defendant from further using the land for church purposes but denying the mandatory relief which would have required the defendant to remove the buildings then located upon the land. Both sides having appealed, we will designate the parties as they appeared in the trial court.

The Church holds title to the land under deed from Roy D. Brite, et al, and the property is that described in the opinion of this court in *Brite v. Gray*, 377 S.W.2d 223 (Tex. Civ. App., Beaumont, 1964, no writ), to which we refer for more details. The pastor of the defendant Church is the Reverend Mr. J. Boyd Davis whose conviction for contempt in violating the injunction issued in *Brite v. Davis*, supra, was reviewed by the Supreme Court

in *Ex Parte Davis*, 470 S.W.2d 647 (Tex. Sup. 1971), to which we also refer for more details. The facts are not in dispute although the parties are in disagreement as to the law governing such facts.

Although a veternary clinic was involved in the *Brite Case* and a church is involved in this case, the restrictions are the same, only those pertinent to the decision having been set out in *Brite*. As applied to this case, the restrictions specify that:

> "No structure shall be erected,, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in heights and a private garage for not more than two cars."

The defendant Church acquired the property by deed from Dr. Brite dated August 16, 1965. On August 31, 1965, counsel for the present plaintiffs addressed a letter to the pastor of the Church advising of the restrictive covenants applicable to the addition and of the holding of this court in *Brite v. Gray*. The defendant made no use of the land until April 28, 1971, when it moved two buildings on to the land. The Reverend Mr. Davis described the buildings in this manner:

> "Well, they're frame buildings, one of them is about forty by eighty, I guess, and the other one maybe twenty by twenty-four. One of them is used for Sunday School, young people's meeting place, and the other is the Sanctuary with three or four classrooms in it."

The larger of the two buildings is the sanctuary where preaching services are held and the smaller building is

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used for Sunday School purposes. There are no sleeping facilities in either building.

At some time in the future, presumably when financially able, Church intends to construct a new building upon the premises but no definite plans therefor were in existence at the time of the trial.

By the first two points, the defendant contends that the trial court erred in peremptorily instructing the jury to return a verdict for the plaintiffs because (a) the evidence showed that the individual plaintiffs had suffered no damage by reason of the use of the property for church purposes; and (b), alternatively, the evidence raised a question for the jury to determine if plaintiffs had sustained actual damage. Each of the plaintiffs testified, in substance, that the presence of the church had not actually disturbed him in the occupancy of his home nor did either plaintiff contend that he had sustained actual monetary damage by reason of its presence. Each feared that if the restrictions were not maintained, the area would depreciate in value by the other noncomplying uses being made of this and other lots in the addition.

We disagree with defendant and overrule the points. In *Cowling v. Colligan,* 158 Tex. 458, 312 S.W.2d 943, 946 (1958), the court said:

> "The authorities are uniform in declaring that the erection of a church violates a covenant restricting the use of property for residential purposes."

This case was followed by *Protestant Episcopal Church Council v. McKinney,* 339 S.W.2d 400, 403 (Tex. Civ. App., Eastland, 1960, error ref.), wherein the court, rec-

ognizing the general rule advanced by defendant in our case, continued, saying:

> "However, an exception to the above stated general rule is found in cases holding that a covenant restricting the use of land may be enforced by injunction where a distinct or substantial breach is shown, without regard to the amount of damages caused by the breach, and that in such cases it is not necessary to show the existence of any particular amount of damages or to show that the injury will be irreparable."

Having reviewed the record, we say, as did the Eastland court in the *McKinney Case*, supra: "In our opinion the evidence supports the conclusion that the breach of the restrictive covenant in the instant case is a distinct and substantial one." (339 S.W.2d at 404) We go even further and say that such fact was established as a matter of law, thereby authorizing and requiring the trial court to grant the motion for peremptory instruction.

Defendant's third and fourth points contend that the injunction denies to defendant its freedom of religion and of worship, thereby running afoul of the First and Fourteenth Amendments to the Constitution of the United States and Article 1, § 6 of the Constitution of the State of Texas, respectively. We express our complete and wholehearted adherence to and support of each of the constitutional provisions cited; but, we reject the contentions so advanced. The only case remotely in point cited by defendant is that of *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441 (1948). The restrictions involved in *Shelley* provided that no part of the property could be " 'occupied by any person not

of the Caucasian race' " and could not be used " 'for resident or other purpose by people of the Negro or Mongolian Race.' " (334 U.S. at p. 10) Judicial enforcement of the restrictive covenant was denied because it constituted "discriminatory action on the part of the States based on considerations of race or color." (334 U.S. at p. 23)

Defendant's reliance upon *Shelley* is misplaced. The restriction which was enforced in the instant case applied equally to churches of all denominations and faiths. If the restriction applied only to Baptist churches while permitting those of other denominations, the rationale of *Shelley* would be more persuasive. Defendant's points three and four are overruled.

In *Brite v. Gray,* supra, this court pointed out that the deed into Brite described two tracts of land: Tract One, all of Lots Nine and Ten in Block Two, and a small strip of property contiguous thereto containing .261 acres, designated as Tract Two (377 S.W.2d at p. 224). The deed from Brite to defendant Church, conveying the identical land mentioned in the prior decision of this court, included the restrictions which appeared in the deed to Brite as to Tract One but did not refer to the restrictions in describing Tract Two.

Defendant contends that Tract Two was not included in the original plat or dedication of the addition but, upon the contrary, such land "constitutes builtup land outside of the platted portion of the subdivision" and not controlled by the restrictions as to the other lots. Alternatively, defendant contends that a fact issue was presented for determination by the jury. Defendant offered testimony

that after the dedication of the subdivision in 1949, the developers permitted a contractor engaged in improving a nearby street to dump the spoil into the lake and a substantial area was reclaimed from the lake which became a part of Tract Two.

Brite's conveyance to the Church followed precisely the form of the deed whereby he acquired the land from Austin, as mentioned in *Brite v. Gray,* supra, and did not include the restrictions as to Tract Two. However, in the chain of title to the property acquired by defendant Church there appeared the deed mentioned in the *Brite Case* from the developers to Austin which did contain the restrictions. The court disposed of the point in this manner:

> "Moreover, the Austins accepted title to Tract Two with restrictions imposed thereon. These were restrictive covenants running with the land. They could convey no greater estate to appellants than that which they had received. Matthews v. Rains County, Tex. Civ. App., 206 S.W.2d 852.
>
> "We hold that appellants' property, Tract Two (2), is burdened with the same restrictions applicable to other lots in the addition and that the trial court correctly issued the injunction." (377 S.W.2d at p. 225)

The land which Brite sold to the Church was burdened with the restrictions as to both tracts and he could not, just as Austin could not, convey a greater estate than that which he had received. The restrictions were a part of Brite's title and the Church could not trace its title back to its source without being directly informed of the existence of the restrictions as to Tract Two.

A purchaser is charged with and bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims. *Wessels v. Rio Bravo Oil Co.*, 250 S.W.2d 668, 670 (Tex. Civ. App., Eastland, 1952, error ref.). Thus, the Church was chargeable with notice, not only of the restrictions appearing in its deed, but also with notice of whatever a diligent inquiry would have revealed. *Carter v. Hawkins*, 62 Tex. 393, 397 (1884). Inquiry would have brought home to the Church knowledge that this court had theretofore held Tract Two to be covered by the restrictions applicable to the entire subdivision.

The rule of collateral estoppel or estoppel by judgment is also applicable in this case. For an authoritative discussion of the rule, see *Benson v. Wanda Petroleum Company*, 468 S.W.2d 361 (Tex. Sup. 1971). The Church, being in privity with Brite, its grantor, is bound by the judgment of this court holding the restrictive covenants applicable to Tract Two. *Kirby Lumber Cor. v. Southern Lumber Co.*, 145 Tex. 151, 196 S.W.2d 387 (1946).

Additionally, the doctrine of res judicata is applicable here. Res judicata, extending both to questions of law and issues of fact, binds not only the parties to the first suit but those who claim under them. *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. Sup. 1964). See also, *Cain v. Balsom*, 130 Tex. 497, 109 S.W.2d 1044, 1045 (1937).

We recognize the rule that in construing covenants restricting the use of land, all doubt should be resolved in favor of freer use of land and against the restrictions.

But, in this instance, there is no ambiguity in the restrictive covenants and they must be enforced as written. Cf. *Southampton Civic Club v. Couch,* 159 Tex. 464, 322 S.W.2d 516 (1958). Points five and six are overruled.

The Church next contends that the trial court erroneously granted the peremptory instruction because, as it is phrased in point seven, "the undisputed evidence in this case shows that no other use of the land could be made and that the land was not suitable for any other use than that to which it was being put." Alternatively, by point eight, it contends that a fact issue was presented which should have been submitted to the jury. We disagree and overrule both points.

The two tracts owned by the defendant constituted "a border tract and is openly exposed to" changed conditions, as mentioned in *Cowling v. Colligan,* supra (312 S.W.2d at 946). Assuming, without deciding, that there was some evidence of changed conditions outside the subdivision since the dedication of the addition, nevertheless, defendants may not prevail. This result is required because there was no evidence that the benefits of the original plan for a restricted subdivision could not still be realized for the protection of the interior lots. *Cowling v. Colligan,* supra; *Western Management Corp. v. High Crest Realty Co.,* 331 S.W.2d 365, 367 (Tex. Civ. App., Fort Worth, 1960, error ref.).

Nor does the fact that the City of Beaumont may have zoned the property in such a manner it could be used for purposes other than single family dwellings alter the result. *Lebo v. Johnson,* 349 S.W.2d 744, 751-752 (Tex. Civ. App., San Antonio, 1961, error ref. n.r.e.).

Finally, defendant contends that by reason of the use to which other lots in the subdivision had been put in the past, there were issues of waiver and estoppel raised which should have been submitted to the jury. Defendant has neglected to cite to us the record references supporting such claims, but our own study of the record convinces us that no such issues were raised by the evidence.

It is contended that Coastal Pools, a commercial establishment, has operated without challenge by plaintiffs. Such fact is true to the record, but defendant neglects to advise us that Coastal Pools is situated upon Lot One of Block One. The dedication and the deed restrictions both specifically mention this particular lot, the language being:

> *Dedication:* "(1) All lots in the tract shall be known and described as residential lots, except Lot One (1), in Block One (1). * * *"
>
> *Deeds:* "(5) * * * Lot One (1) in Block One (1) is reserved for commercial purposes and any building used for retail sales may be erected on this site. * * *"

There is also some record reference to the holding of church services in the home of one of the plaintiffs and defendant contends that such constituted a violation of the restrictive covenants which would authorize the application of the doctrine of waiver and estoppel.

There are several difficulties experienced when this latter contention is considered. Defendant did not prove by any competent evidence that the holding of the church services in the house of one of plaintiffs was "the principal and primary uses for which the property is main-

tained." Thus, we face the opposite situation to that found in *McKinney*, supra (339 S.W.2d at p. 404). For aught that appears in our record, the occasional services held in one plaintiff's home was purely incidental thereto and not violative of the restrictions. *Southampton Civic Club v. Couch*, supra, (322 S.W.2d at p. 518).

Furthermore, such activities were merely trivial in nature and did not constitute a waiver of the right to enforce the restrictions against the defendant in this case. *Stewart v. Welsh*, 142 Tex. 314, 178 S.W.2d 506, 508 (1944); *Cowling v. Colligan*, supra (312 S.W.2d at p. 946).

Having carefully reviewed all of defendant's points challenging the judgment of the trial court granting the prohibitory injunction and finding no error, the judgment prohibiting the further use of the land for church purposes is in all things AFFIRMED.

We turn now to the appeal of the plaintiffs below from the portion of the judgment which denied their prayer for a mandatory injunction requiring the defendant to remove the buildings now being used for church purposes from the land involved.

Plaintiffs' point is that since the undisputed evidence showed that the "mere presence of the church structures upon the lands and premises in question is in violation of the deed restrictions made the basis of this suit, the Trial Court erred in failing to require" the removal of the structures.

Admittedly, plaintiffs' pleadings were adequate to support the mandatory relief which it sought and we have already upheld the trial court's finding that the presence

of the structures was violative of the restrictions upon the land.

In several cases cited to us, the violation of restrictions having been established by the evidence, the plaintiffs became entitled to have the offending structures removed. In *Melton v. Miller*, 391 S.W.2d 568 (Tex. Civ. App., Houston, 1965, no writ), the trial court having found the violation of the restrictive covenant, granted a mandatory injunction to require the removal of a carport and the judgment was affirmed. In *Shepler v. Falk*, 398 S.W.2d 151 (Tex. Civ. App., Austin, 1965, error ref. n.r.e.), a fence constructed in violation of deed restrictions was ordered removed and the judgment was affirmed.

Finally, in *Braes Manor Civic Club v. Mitchell*, 368 S.W.2d 860, 861 (Tex. Civ. App., Waco, 1963, error ref. n.r.e.), defendants were using a lot as a parking lot for tenants in apartment houses. The trial court denied the injunctive relief, prohibitory and mandatory, and upon appeal the judgment was reversed, the court saying that:

> "The trial court should have rendered judgment enforcing the restrictions. The judgment is accordingly reversed and remanded to the Trial Court with instructions to enter permanent injunction restraining defendants from using lot 7 as a parking lot; and requiring defendants to remove the paving, carports and fencing, used in connection with parking, from such lot."

Defendant, in its reply to plaintiffs' appeal from the denial of the mandatory injunction, simply reiterates its contentions which we have overruled earlier. Thus, its defense of the trial court's action in denial of the manda-

tory injunction does not answer the contention that plaintiffs received only half the relief to which they claimed to be entitled.

In *Bickler v. Bickler,* 403 S.W.2d 354, 361 (Tex. Sup. 1966), the mandatory injunction to require the removal of a sidewalk was sought by trial amendment when a surveyor established that the sidewalk in question was upon plaintiff's lands. This action of the trial court was singled out for approval by Chief Justice Calvert.

In *6 Texas Practice, Remedies, Lowe & Archer,* § 330, p. 343 (1957), it is said that "Texas courts do not hesitate to issue the writ [of mandatory injunction] when it is essential to remedy a wrong and no other adequate means of effecting the needed relief exists." The *Bickler, Braes Manor,* and *Melton Cases,* supra, are cited in support of the text.

The right to the mandatory relief, when such is necessary to afford a party full protection of his established rights, is clear under the Texas decisions. Indeed, as applied to the facts of this case, it is "the only pertinent remedy available." *City of Mission v. Popplewell,* 156 Tex. 269, 294 S.W.2d 712, 715 (1956).

From our description of the two structures which were moved on to the disputed premises from elsewhere in Beaumont, it is readily apparent that the structures were not designed nor suitable for use as a private residence. Indeed, defendant made no contention in the court below that such structures were useful for any purpose other than for what they were designed and built originally—church purposes. Nor did defendant seek to justify the placement of the structures on the particular land under

any theory of law other than those discussed by us in its appeal—none of which have been found compatible with the law and the facts.

Instead, the Reverend Mr. Davis justified the continuing use of the property in this manner:

> "Q. Is the sole basis upon which you contend that the Church is rightfully on that land the fact that it's your contention that this is a single-family residence or these are single-family residences?
>
> "A. Yes, we contend that this is a single family of God who meet in God's House, like every other gathering of Christian people.
>
> "Q. And that is the sole basis upon which you contend that the Church is rightfully on that land?
>
> "A. That it is a House of God and single residence, yes."

We are not in a position to and do not take issue with the theological base of the contention so advanced. However, with all deference to the ecclesiastical expertise of the Reverend Mr. Davis, we disagree with his legal interpretation of the respective covenant involved here.

Since we are required to follow the authoritative decisions of our courts, we now hold that the use being made of the land involved is, as a matter of law, violative of the restrictions. *Cowling v. Colligan*, supra, and *Protestant Episcopal Church Council v. McKinney*, supra.

Plaintiffs were entitled to all of the relief which they sought and the trial court erred in refusing to grant the mandatory injunction to compel the removal of the strutures from the premises. The judgment, insofar as it denied

plaintiffs the mandatory injunction sought, is reversed and the cause remanded to the trial court with instructions to enter a permanent injunction requiring the defendant to remove the structures presently upon the premises in question.

The judgment of the trial court is in part affirmed and in part reversed and remanded with instructions.

Quentin Keith

Opinion delivered
April 27, 1972

APPENDIX C

COURT OF CIVIL APPEALS
Ninth Supreme Judicial District
Beaumont, Texas
77001

Martin Dies, Jr., Chief Justice
Homer E. Stephenson,
Associate Justice
Quentin Keith, Associate Justice

Elizabeth LeBlanc
Clerk

May 18, 1972

RE: No. 7343-Charles Ireland, et al., v. Bible Baptist Church

Hon. H. M. Oldham
Beaumont, Texas

Hon. A. W. Dycus
Beaumont, Texas

Hon. Phillip Bordages
Beaumont, Texas

Rienstra, Rienstra & Dowell
Beaumont, Texas

Gentlemen:

The Motion for Rehearing by Bible Baptist Church in the above styled cause has been overruled this day.

Yours very truly,

Clerk

APPENDIX D

CLERK'S OFFICE—SUPREME COURT
Austin, Texas

October 4, 1972

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of CHURCH v. IRELAND ET AL., No. B-3443, was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX E

CLERK'S OFFICE—SUPREME COURT
Austin, Texas

November 1, 1972

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of BIBLE BAPTIST CHURCH v. IRELAND ET AL., No. B-3443, was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

FILE COPY

FILED
FEB 5 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1081

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

vs.

WASHINGTON TERMINAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ----------.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

vs.

WASHINGTON TERMINAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

Petitioner, International Brotherhood of Electrical Workers, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on December 19, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A, *infra,* pp. A1-A40, and is not yet officially reported. The findings of fact, conclusions of law and order of the United States District Court for the District of Columbia (Appendix C, pp. A42-A44, *infra*) are unreported.

JURISDICTION

The judgment of the Court of Appeals, set forth in Appendix B, *infra*, p. A41, was entered on December 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

On December 4, 1969, negotiators for four unions, including petitioner as bargaining agent for the craft of electrical workers, initialed a memorandum as the possible basis for resolving a wage and rules dispute with the nation's railroads. Among other things, the memorandum, which was subject to ratification and ultimately rejected by the membership of one of the unions, proposed a new work rule permitting mechanics to perform as part of their main job assignment "incidental work" normally performed by mechanics of the other crafts involved in the proposed settlement. The understanding also required the carriers to withdraw their demands for rule changes, including the creating of a composite mechanic, and to waive for a prescribed time the right to demand any further bargaining on those subjects. To prevent a nation-wide rail strike by four unions, Public Law 91-226 was enacted on April 9, 1970, to provide that said memorandum would "have the same effect (including the preclusion to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act." Although the basic collective agreement in effect since 1946 prohibited the railroad from using any employees other than electricians to perform any work in that craft, the railroad, several months after passage of the statute, began to use employees in crafts other than those represented by the four unions initialing the memorandum and designated as parties thereto in Public Law 91-226 to perform electrical work

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incidental to a major assignment. The questions presented are:

1) Do Sections 2, Seventh and 6 of the Railway Labor Act (45 U.S.C. §§ 152, Seventh, and 156) prohibit the railroad from unilaterally changing major conditions of employment by extending the terms of an understanding, placed into effect by Public Law 91-226, to encompass crafts which were not parties to the understanding or designated as such in the Statute?

2) Having withdrawn and waived its demand for a composite mechanic, did the railroad violate Section 2, First of the Railway Labor Act (45 U.S.C. § 152, First), which requires the parties to maintain agreements and to bargain in good faith, when it subsequently extended the terms of the incidental work rule to crafts that were not party to the understanding or designated as such in Public Law 91-226, thereby creating a composite mechanic as to incidental work?

STATUTES INVOLVED

The statutes principally involved are Sections 2, First and Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, First and Seventh, and 156 (44 Stat. 577, as amended), and Public Law 91-226 (84 Stat. 118, amending 44 Stat. 577). These provisions, along with other pertinent parts of the Railway Labor Act are printed in Appendix D hereto, pp. A45-A55, *infra*.

STATEMENT

The International Brotherhood of Electrical Workers (IBEW), the petitioner herein, instituted this action for a declaration of the rights of the parties under Public Law 91-226, and for an injunction requiring the Washington Terminal Company (Terminal) to maintain those rules and working conditions of its employees in effect prior to April 9, 1970, except insofar as Public Law 91-226 permitted the railroad to use employees in the three other crafts covered by said law to perform incidental work in the craft represented by IBEW, until such time as the notice and negotiation procedures of the Railway Labor Act had been exhausted. The complaint alleged, *inter alia*, that the railroad had violated the notice and negotiation provisions of the Act and had engaged in bad faith bargaining through its unilateral changes in working conditions (J.A. 5-6, 7),[1] as well as improperly extending Public Law 91-226 beyond the class of persons designated within its coverage (J.A. 8-10). The district court denied IBEW's motion for a preliminary injunction, and the court of appeals affirmed. IBEW now seeks review by this Court.

Since at least June 16, 1946, Terminal has had a collective bargaining agreement with Railway Employes' Department, System Federation No. 106 (J.A. 38). IBEW, the International Association of Machinists and Aerospace Workers (IAM), the International Brotherhood of Boilermakers and Blacksmiths (IBBB), the Sheet Metal Workers International Association (SMWI), and the Brotherhood of Railway Carmen (BRC) are parties to the basic agreement, and along with the International Brotherhood

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[1] Joint Appendix in the court below.

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of Firemen and Oilers (IBFO), make up the System Federation. [2]

Said agreement provides for separate seniority rosters in each craft and for certain classes of employees in each craft, and prohibits Terminal from performing the work of any craft represented by a signatory to the agreement with persons who are not members of that craft and do not hold seniority therein. [3] Up to the time of the present dispute, Terminal did not use employees in any craft other than that of electrical workers represented by IBEW to perform electrical work (J.A. 4, 38).

On November 8, 1968, IBEW, through its General Chairman, served a Section 6 Notice (45 U.S.C. § 156) on Terminal, which demand solely related to rates of pay (J.A. 6, 14-16). Identical notices were separately served by representatives of IAM, IBBB and SMWI, each suggesting the notices should be handled jointly at a national level for all carriers involved and the four unions in the event agreement with Terminal could not be reached [4] (J.A. 8, 12-13).

On November 26, 1968, Terminal, as well as most of the nation's railroads, served a joint notice on the representatives of the four unions (J.A. 8, 16). This notice

---

[2] IBEW is bargaining representative for the craft of electrical workers on Terminal; IAM, craft of machinists; IBBB, crafts of boilermakers and blacksmiths; SMWI, craft of sheet metal workers; and BRC, craft of carmen.

[3] Rule 27 of the System Federal Agreement reads in pertinent part: "None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft." (J.A. 3). Mechanics' work of electricians is specifically set out in Rule 62 (Electrical Workers Special Rules) (J.A. 4).

[4] In view of the fact that BRC and IBFO had elected to progress and bargain separately on their own different demands, which they did subsequently do, the Executive Council of the Railway Employes' Department decided IAM, IBEW, IBBB and SMWI "would proceed as a unit to progress [the November 8, 1968] notice to a conclusion excluding the other two organizations forming" the Department (J.A. 42).

proposed, among other things, to create a composite mechanic by eliminating all rules or practices prohibiting the use of any of the employees involved to perform work in a craft in which he did not have seniority, and further to merge all classifications of work into one classification in order that the carrier could assign any work to be "performed by any employee of the class to which the rule is applicable irrespective of craft." (J.A. 20).

Since no agreements were reached with any individual carriers, including Terminal, negotiations took place at the national level involving only the four unions serving those notices (J.A. 42, 43). Subsequently, the railroads and the four unions were unable to settle their dispute; the National Mediation Board was unsuccessful in obtaining agreement through its mediatory services; and the recommendations of Presidential Emergency Board No. 176 failed to yield a settlement. See *Machinists v. Nat'l. Ry. Labor Conf.*, 310 F. Supp. 905 (D.D.C. 1970).

Through the mediatory efforts of the Emergency Board, and later the Department of Labor, a so-called incidental work rule began to be discussed, which had as its purpose the slight modification of work rules to partially obscure the classifications between mechanics who were machinists, electricians, boilermakers, blacksmiths and sheetmetal workers (J.A. 43-44).

In an effort to achieve a settlement within the 30-day "cooling-off" period provided in Section 10 of the Act (45 U.S.C. § 160), marathon negotiating sessions were held, out of which the parties reached an understanding reflected in a memorandum initialed by the parties on December 4, 1969. This document included the incidental work rule (J.A. 44).

The understanding did not contain explicit or formal contract language (J.A. 44).[5] It did specify certain wage

[5] In addition, as the chief negotiator for the unions, IAM Vice-President William W. Winpisinger, stated:

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increases to the employees and also included special wage increases "applicable to mechanics only" (J.A. 22-23). The memorandum also referred to certain "rules changes effective as of the date of notification of ratification of the agreement," which included the "incidental service rule" set forth in an attachment No. 1. In relevant part, the incidental work rule says:

> ". . . At running repair work locations which are not designated as outlying points where a mechanic or mechanics of a craft or crafts are performing a work assignment, the completion of which calls for the performance of 'incidental work' (as hereinafter defined) covered by the classification of work rules of another craft or crafts, such mechanic or mechanics may be required, so far as they are capable, to perform such incidental work provided it does not comprise a predominant part of the total amount of work involved in the assignment."

Attachment No. 4 stated that the finalized agreement would be one between each of the carriers, including Terminal, and "its employees represented by the organizations signatory hereto." No organization, other than IAM, IBEW, IBBB and SMWI initialed the memorandum. This attachment further provided that the agreement would be in settlement of the dispute growing out of both sets of notices, would require the carriers to withdraw their pending notices on any subject referred to in the understanding, and would prohibit the parties from serving any section 6 notice for the purpose of changing those provisions, or relating to the subject matter therein, until September 1, 1970.

(Continued from previous page)

"At no time was it ever indicated that the rule would apply to any but the crafts represented by the four organizations. In view of Attachment No. 4 [a moratorium and effect of agreement provision], the carriers could not take any action to modify the disposition reached on the subject . . ." (J.A. 44).

Since the memorandum was not self-executing and required ratification by the members of the four unions, the initialing of the understanding did not terminate the dispute. A majority of SMWI later rejected the understanding (J.A. 44).

On January 31, 1971, a selective strike by the four unions against the Union Pacific and the railroads' threatened retaliatory nationwide lockout were temporarily restrained. After various extensions, a preliminary injunction against selective strikes was issued on March 2, 1970. *Int'l. Ass'n. of Machinists v. Nat'l. Ry. Labor Conf.*, 310 F. Supp. 904 (D.D.C. 1970). During this period, the IBEW, IAM and IBBB tendered an offer to accept the understanding without SMWI. This offer was summarily rejected by the carriers on the basis that SMWI had to be included. And a follow-up offer to substitute the BRC was likewise rejected on the ground that the special increase of 17 cents per hour to the mechanics involved in the dispute had been computed solely on the participation of *the four* organizations (J.A. 45).

The unions' announced intention to commence a nationwide strike on March 4, 1970. was postponed by enactment of Public Law 91-203, 84 Stat. 22, on that date.

As the parties ultimately reached a definite impasse, a potential nationwide rail strike was averted when, on April 9, 1970, Congress enacted Senate Joint Resolution 190, Public Law 91-226, 84 Stat. 118. The Joint Resolution referred to the outstanding labor dispute between the carriers represented by the National Railway Labor Conference including Terminal, and the four unions, and is set up at pp. A45-A46, *infra*.[6] Public Law 91-226 provided:

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[6] Throughout the history of the legislation, it was apparent Congress and the railroads, which advocated passage of the bill, considered the proposed statutory enactment and memorandum as applying only to the four organizations, and that, through the

(Footnote continued on following page)

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"The memorandum of understanding, dated December 4, 1969, shall have the same effect, (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act."

Except as to the interplay between the parties designated in the understanding, the restrictive rules in the System Federation agreement continued in effect; and until the first part of May, 1970, Terminal did not use employees in crafts other than those represented by the four organizations to perform incidental work in the craft of electrical workers.

On May 29, 1970, IBEW, through its General Chairman, advised Terminal that its use of employees from crafts other than represented by the four unions to perform incidental electrical work violated Section 2, Seventh of the Railway Labor Act, and threatened to strike unless the unilateral acts were stopped (J.A. 12). Thereupon,

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(Continued from previous page)

statute, Congress was placing into effect a binding contract between the carriers and only the employees represented by those four unions. Hearings, House Comm. on Interstate and Foreign Commerce, H. J. Res. 1112, 91st Cong. 2nd Sess. (1970), p. 9; Hearings, Senate Comm. on Labor and Public Welfare, S. J. Res. 178, 91st Cong. 2nd Sess. (1970), Vol. I, pp. 92-93. Likewise, the carriers' chief negotiator repeatedly emphasized that the special wage increase had been attached to the rule on the basis of participation of the four unions, and that less than four would require a reduction in the amount offered. House Comm. Hearings, *supra*, pp. 245, 247; Senate Comm. Hearings, *supra*, Vol. II, pp. 118, 119. Logically, it follows that the amount of the increase would have necessarily been greater if the rule contemplated its automatic extension to a fifth or sixth union. Moreover, contrary to the preview of the rule made by the lower court (pp. A20-A22, *infra*), the carriers' negotiator in other litigation and before Congress explicitly testified: "Under the incidental work rule, *members of each of the crafts involved in this dispute* would be permitted to perform work within the scope of one of the other crafts' classification of work rules in certain circumstances when such work is incidental to the mechanic's [obviously of the four crafts] main job." House Comm. Hearings, *supra*, p. 245 (Emphasis supplied).

Terminal did discontinue its actions subject to a meeting of the national negotiators, who had initialed the understanding (J.A. 40).[7]

At this conference, held on July 8, 1970, the railroad's national negotiator took the position that the understanding, as effectuated by Public Law 91-226, could be arbitrarily extended to encompass crafts of employees whose bargaining representatives were not party thereto (J.A. 36-37). In light of this adamant position, Terminal did on August 4, 1970, again alter the rules and working conditions for the craft of electrical workers, and has continued to use employees in crafts other than those represented by IBEW, IAM, IBBB or SMWI to perform electrical work on that carrier's equipment (J.A. 40, 41).

The district court refused to enjoin Terminal, because (1) Congress intended through Public Law 91-226 that

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[7] About the same time that Terminal rescinded its action, the Southern Pacific Transportation Company instituted a similar program. Unable to resolve the problem, IBEW notified that carrier and the National Mediation Board that a strike would take place on June 29, 1970 (J.A. 66). On that date, the United States District Court for the Eastern District of California issued an order prohibiting the strike, and on July 9, 1970, granted Southern Pacific a preliminary injunction. *Southern Pacific Transp. Co. v. Int'l. Broth. of Electrical Workers*, Civil No. S-1699 (E.D. Cal. 1970) (J.A. 66-69). As a condition for issuance of the injunction, Southern Pacific was required to submit the dispute to the Adjustment Board within five days, which it did do. On July 31, 1970, IBEW sent to the Board a letter in the nature of a motion to dismiss for lack of jurisdiction (See Appendix E, pp. A56-A58, *infra*). To date, no response has been made on that request, nor has the Mediation Board taken any action on IBEW's invocation of its services.

On August 7, 1970, IBEW filed a notice of appeal docketed as No. 26,696 in the Court of Appeals for the Ninth Circuit. Prior to filing said notice, IBEW filed on July 31, 1970, an answer and counterclaim, which was virtually a verbatim copy of the complaint in this action. On October 5, 1970, that district court denied the relief requested, and entered a written order on November 4. IBEW appealed from the order denying its counterclaim, which appeal was docketed as No. 71-1390 in the Ninth Circuit. The cases were consolidated for argument. On January 23, 1973, without independent discussion, the Ninth Circuit affirmed *per curiam*, citing the determination below.

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the understanding be applied "across the board" to all mechanics of all crafts; (2) the dispute was minor and therefore within the jurisdiction of the National Railroad Adjustment Board; and (3) the action taken by the district court in the Southern Pacific case was persuasive authority (J.A. 73-76). The Court of Appeals affirmed on the ground that "the dispute is one which should be resolved under the 'minor dispute' procedures of the Railway Labor Act" (p. A18, *infra*).

IBEW now seeks review by this Court.

REASONS FOR GRANTING THE WRIT

In *Detroit & Toledo Shore Line R. Co. v. Locomotive Firemen & Eng.*, 396 U.S. 142, 1969), this Court examined the nature of a carrier's obligation to maintain the "status quo" during the pendency of a "major dispute" as to a proposed change in agreements, which were silent on the subject contained in the union's demand. In *Chicago & N. W. R. Co. v. United Transp. Union*, 402 U.S. 570 (1971), this Court decided that Section 2, First was designed to be a legal obligation enforceable through injunctive relief and obligated both railroads and unions to make and maintain agreements and to bargain in good faith during the formal procedures imposed by the Railway Labor Act. In this case, we ask the Court to determine the nature of a carrier's obligation to follow the notice and negotiation procedures of the Act, to bargain in good faith, and to refrain from unilaterally effecting changes in its employees' working conditions immediately following a settlement mandated by Congressional action. We also ask the Court to decide whether the carrier, on the basis of the allegations in the complaint and the evidence presented, violated the good faith bargaining requirements of the Act by unilaterally extending the incidental work rule to crafts not party to the negotiations or involved in the dispute before

Congress, when the carrier had specifically waived its right to bargain on that rule for a specific time and had withdrawn its demand for more extensive changes during the bargaining sessions. In sum, we are asking the Court to determine the questions left open in the *C. & N. W.* case; whether Section 2, First requires more than to avoid bad faith bargaining during negotiations, and whether certain parallel precedent evolved from the National Labor Relations Act (29 U.S.C. 151) is applicable to this Railway Labor Act case. *Id.* at 579, n. 11.

Since this is the first time that Congress itself has regulated the terms of a collective agreement through the adoption of an incomplete memorandum of understanding as part of the Act, which enactment was conceived as the termination of the labor dispute between the parties before it, and since this case involves the extent to which the railroad's duty to bargain in good faith obligates it to maintain agreements, there are no more important questions with respect to railway labor relations before the courts today. We therefore believe this matter deserves review.

1. The decision below is directly in conflict with applicable decisions of this Court. The court below held that the subject matter of this litigation was a "minor dispute" involving the meaning of several words contained in the incidental work rule attached to the understanding ininitialed by the parties. The court therefore concluded that the dispute was one for administrative determination by the National Railroad Adjustment Board under Section 3, First of the Act (45 U.S.C. § 153, First), and was nonjusticiable, p. A20, *infra*. Having decided that the incidental work rule was reasonably susceptible to Terminal's interpretation and application, the Court of Appeals did not consider whether the railroad had violated the good faith bargaining requirements of Section 2, First (45 U.S.C. § 152, First). See p. A33, *infra*. We submit this view is

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contrary to the two separate but companion principles of railway labor law that have developed from a reading of the Act.

Construing the various provisions of the Act and the disputes handling procedures set forth therein, this Court has stated that "major disputes," *i.e.*, disputes over the *creation* of rates of pay, rules, or working conditions, are:

> ". . . disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945).

It is clear that the objective of a major dispute is to bring about a *change in or new* rates of pay, rules or working conditions. Therefore, contrary to the view expressed by the court below, from the test prescribed in the *E. J. & E.* case, and a reading of Section 2, Seventh and Section 6, an effort by either party to bring about a change in the terms of an existing agreement or to create a new agreement, either formally through the service of a Section 6 notice, or through unilaterally imposed changes in major conditions of employment, constitutes the establishment of a major dispute.

The courts, however, have had great difficulty in deciding, on the basis of the major-minor labels alone whether the notice and negotiation procedures must be followed in a particular case. Rather, each case has turned on matters of substance, and the final determination has depended on the court's view of what the carrier actually intended to accomplish. [8]

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[8] *United Industrial Workers v. Galveston Wharves*, 351 F.2d 183, 188-189 (5th Cir. 1965); Harper, *Major Disputes Under the Railway Labor Act*, 35 J. Air L & Comm. 3, 16-17 (1969).

The court below apparently recognized the need to look at Public Law 91-226 and the initialed understanding but refused to make its findings in light of these facts: (1) the original Section 6 notices were served by only the four unions; (2) the carrier's notice was served jointly on the four unions only; (3) the negotiations were limited to the four unions; (4) the carriers initially withdrew portions of their proposals applicable to crafts represented by other unions; (5) only the four unions were parties before Emergency Board No. 176, and the references in the latter's report to the President referred to the work rules pertaining to the mechanics in the crafts involved before it; (6) the understanding was initialed by only the four unions; (7) the memorandum included wage increases for "mechanics" which were not applied automatically to other crafts; (8) the memorandum required withdrawal of the carriers' proposal to eliminate work classifications and to create a composite mechanic; (9) the carriers had an opportunity, after the memorandum had been rejected in the ratification process, to specifically include carmen but specifically refused this offer; (10) only the four unions were eligible to participate in the nation-wide strike prevented by Public Law 91-226; (11) the legislative history and specific language of the enactment establish that its provisions merely referred to the four unions involved in the dispute; and (12) the course of action ultimately taken by Terminal clearly contravened the basic provision of the System Federation agreement which continues to prohibit the use of employees in other crafts to perform electricians' work.[9] Furthermore, when viewed in its full breadth, this case concerns a dispute of major propor-

[9] The court below narrowly construed one sentence from the Public Law and two words from the memorandum. However, a proper understanding of their object and purpose can only be made by reviewing them in their entireties and in light of the factual background. See *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288 (1956).

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tions, from both the standpoint that the Terminal's action ultimately leads to a reduction in jobs and the quality of existing jobs and also, as we later show, that the dispute transcends mere time claims which may be adjusted by money payments.

If the instant controversy is a major dispute, as we claim, it is clear that Terminal was required to follow the notice and negotiation procedures of the Act, and should have been enjoined from making the unilateral changes. In *Detroit & T. S. L. R. Co. v. Locomotive Firemen & Eng.*, 396 U.S. 142 (1969), this Court held that a railroad could not make unilateral changes during the pendency of a major dispute without violating the status quo provisions of Section 6 and that, pursuant to Section 2, Seventh, that carrier could not change the working conditions of its employees until the agreements had been altered or modified through negotiations. Moreover, the need to give advance notice as we urge here, and to negotiate on the change was precisely stated in *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), where this Court said, "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6."

Although the above decisions were expressly based upon Sections 2, Seventh and 6 of the Act, this Court appears to have rounded out the law and to have added a new dimension in railway labor relations when, in *Chicago & N. W. R. Co. v. United Transp. Union*, 402 U.S. 570 (1971), it held that Section 2, First imposes a legal obligation enforceable by injunctive relief which requires the parties "to exert every reasonable effort to make and maintain agreements." [10] In short, railroads and their em-

[10] In the *Shore Line* case, this Court found it unnecessary to determine the question whether the railroad had violated a duty to bargain in good faith (396 U.S. at 155, n. 23). On the

(Footnote continued on following page)

ployees' unions are obligated to bargain in good faith and are to avoid bad faith bargaining throughout the entire bargaining process. *Id.* at 574-575. The court below disregarded this contention though raised in the complaint (J.A. 6), and on brief and oral argument.

With this background, let us turn to the specific situation herein, viewing Sections 2, First and Seventh and Section 6 as being interrelated and integral parts of the overall scheme enacted by Congress. While this Court has noted on several occasions that parallels between the National Labor Relations Act and the Railway Labor Act must be drawn with the utmost care, we submit that the pronouncements of this Court under the former statute, and the rationale in support thereof, are equally applicable to the instant dispute. See *Chicago & N. W. R. Co. v. United Transp. Union,* 402 U.S. at 579, n. 11; *Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 383 (1969).

In *NLRB v. Katz,* 369 U.S. 736 (1962), this Court held that an employer violated the duty to bargain collectively by unilateral changes regarding matters on which it was negotiating with the union, even though no finding of subjective bad faith had been made by the Labor Board. In *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964), the employer had determined to contract out the maintenance work at its plant immediately following the termination of the collective bargaining agreement, and refused to negotiate on a new or renewed agreement. Though finding the employer's motive to be economic rather than anti-union, the Board nevertheless found that the employer's failure to negotiate on contracting out this work constituted

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basis of the *C. & N. W.* case, it is now reasonable to assume that such violation did occur. When viewed in the perspective of the *C. & N. W.* rationale, the many decisions in railway labor cases are more easily reconcilable.

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a refusal to bargain in good faith. This Court agreed that the employer was required to bargain on the subject matter in dispute and sustained the Board's order ". . . restoring the status quo ante to insure meaningful bargaining . . ." *Id.* at 216.

Thus, by the time that *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1966), reached this Court, it was unequivocally clear that an employer governed by the National Labor Relations Act cannot unilaterally change wages, hours of employment or conditions of work "unless some provision of the contract authorizes him to do so." *Id.* at 425. The question presented was, therefore, limited to whether a contractual provision which "might" have allowed the employer to make the unilateral change in question would deprive the Labor Board of jurisdiction to determine if that provision "did," in fact, authorize the employer's action. Considering the history of the negotiations, as well as the express provisions of the collective agreement, the Board ruled that the union had not given the employer power to unilaterally change the wage system. [11] In that case, the agreement specified different hourly rates for different members of the crew and gave the employer the right to grant premium rates to any employee. The employer, however, placed all crew members on the same scale and made premium pay dependent upon the production of the crew as a whole. The Ninth Circuit held that the Board did not have jurisdiction, since the unfair labor practice of bad faith bargaining turned ". . . upon a good-faith dispute as to the correct meaning of the provisions of the collective bargaining agreement . . ." (351 F.2d 224, 228). However, the court of appeals did

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[11] Unlike the court below, other courts have examined railroad labor disputes in the context of the history of the negotiations, the intentions of the parties, as well as the express provisions in the collective agreement. See, *e.g.*, *Illinois Central R. Co. v. Locomotive Engineers*, 443 F.2d 136 (7th Cir. 1971).

not decide that the Board's interpretation was incorrect.[12]

Reversing, this Court held that the unfair labor practice proceeding, though concerned with contract interpretation, involved a separate issue as to the employer's unilateral right to change rates of pay contrary to the statutory duty of collective bargaining. Therefore, the contract question did not remove the Board's power. Moreover, this Court held that the Board correctly concluded that the contested contractual provision did not grant the employer the right to institute the changes. *Id.* at 430-431.

The rationale of the above decisions under the National Labor Relations Act is equally applicable in this case. Like in the *C & C Plywood* case, petitioner is merely seeking to "enforce a statutory right which Congress

[12] The district court herein stated that the understanding "applied across the board" (J.A. 73, 75), *i.e.*, to any craft having "mechanics," which nomenclature, of course, includes journeymen in any of the 21 railroad crafts. This interpretation is clearly erroneous. Therefore, the court below took its turn at trying to interpret the language of the incidental work rule within its four corners, pp. A20-A24, *infra*. Although the rule affirmatively compels the mechanics of the signatory crafts to perform incidental work of another craft, it is silent in regard to the giving up of work jurisdiction to another craft (J.A. 24). Thus, the giving up of jurisdiction to incidental work must be implied to have taken place as to the signatories, and, as an implied condition, would necessarily be limited to the four unions, with the express prohibition against other participants still being maintained by reason of the System Federation agreement. The court below nevertheless found "the clear intent of the language used in the incidental work rule, to the extent that it was implemented by Public Law 91-226, requires personnel of the four signatory unions at running repair stations to perform incidental work in *all* the shop 'crafts' and also requires them to allow all the shop 'crafts' to perform incidental work in their 'craft,'" *infra*, p. A22 (Emphasis in original). On this basis, the court below stated that it would reach the same result as the district court, although the Adjustment Board was free to adopt a different approach. While we submit the interpretation of the court below does not follow, that court nevertheless failed to come to grips with the issues of good faith bargaining and lack of proper notice under Section 6, particularly in view of the fact that the parties never fully understood its terms in the sense it was ultimately applied by Terminal and in light of the method by which it was effectuated.

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considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment — 'to provide a means by which agreement may be reached.'" *Id.* at 428. As in *Katz, supra* (369 U.S. at 747), the unilateral action taken by the employer "must of necessity obstruct bargaining, contrary to the congressional policy," in that the action taken by Terminal destroys the future ability to negotiate and to make and maintain agreements (J.A. 46-48). This same philosophy has been expressed by this Court in situations arising under the Railway Labor Act, when it has said that the policy of that Act "is to prevent the union from striking and management from doing anything that would justify a strike," *Shore Line, supra*, 396 U.S. at 150, and that "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute," *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966).

In short, the refusal of the lower courts to grant the requested injunctive relief has created an imbalance as to the equal power or status between the railroad and its employees' representative, a transgression in favor of the former not contemplated by the Act;[13] for, on the one hand, the union is required to bargain in all circumstances and cannot exercise economic self-help to adequately protect the economic interests of those employees represented by it, but the railroad can unilaterally change, and continue to change, working conditions (J.A. 47-48).

The court below nevertheless believed that IBEW had an adequate and sufficient remedy to protect those rights in a proceeding before an adjustment board. How-

[13] The kind of labor philosophy which evolves from the decision below has been severely criticized. *Rutland Ry. Co. v. Locomotive Engineers*, 307 F.2d 21, 42 (2nd Cir. 1962) (T. Marshall, J., dissenting).

ever, the court disregarded IBEW's claim that it "will suffer loss of its reputation to properly represent its membership against this kind of encroachment on said employees' rights" (J.A. 6), and evidence that its image "will be damaged beyond repair" and its membership "will look elsewhere to find someone to represent them" (J.A. 47-48). On precisely that ground, this Court upheld the Labor Board's jurisdiction and rejected the arbitration alternative in *C & C Plywood* (385 U.S. 429, n. 15), "for the real injury in this case is to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents." [14]

Having found jurisdiction of good faith bargaining matters under the Railway Labor Act to be in the federal courts, it is implicit that the judiciary could fashion appropriate relief. In fact, contrary to the opinion below, p. A20 *infra*, an adjustment board has no power to interpret Public Law 91-226,[15] and in interpreting and applying the contract, would not have authority to fashion a remedial order adequate to vindicate violations of the Act. See *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324 (1969); *cf. United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

It is for this reason, we believe, that this Court has stated:

> "[I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of that

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[14] The status as bargaining representative was protected by injunctive relief in *Texas & N. O. R. Co. v. Railway Clerks*, 281 U.S. 548 (1929); and *Virginian Ry. v. System Fed.*, 300 U.S. 515 (1937). The injunctive relief in the instant controversy would have accomplished the same purpose.

[15] See *Detroit & T. S. L. R. Co. v. United Transp. Union*, 396 U.S. at 158-159; see also, *Locomotive Engineers v. Denver & R. G. W. R. Co.*, 411 F.2d 1115 (10th Cir. 1969).

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agreement. Particularly since the collective bargaining agreement which the union sought to change was the result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board."[16] *Railroad Telegraphers v. Chicago & N. W. Ry. Co.*, 362 U.S. 330, 341 (1960).

Therefore, whether this case is viewed from the basis of Section 2, First or from Sections 2, Seventh and 6 of the Act, the pronouncements of this Court are equally applicable herein and lead to a result opposite of that rendered below.

2. The decision below also is contrary to decisions by other courts of appeals and by a district court.

a. The decision below conflicts directly with two decisions of the Sixth Circuit. In *Locomotive Firemen v. Detroit & T. S. L. R. Co.*, 421 F.2d 660 (6th Cir. 1970), *cert. denied*, 398 U.S. 927 (1970), the Sixth Circuit held that a railroad properly was enjoined from unilaterally abolishing the position of firemen on freight trains. The 1942 agreement between the parties required firemen on all diesels, but later contracts did not refer to the subject. Neither party served notice to revoke the agreement, and the railroad used firemen on all diesels to the extent required by arbitration Award 282 issued pursuant to Public Law 88-108. Under the Ohio full crew law, the carrier was required to use firemen an all freight runs on "main" tracks. However, the railroad revised its yards and re-

[16] Furthermore, unlike the situations presented in *NLRB v. Insurance Agents Int'l.*, 361 U.S. 477 (1960), and *Terminal R.R. Ass'n v. Railroad Trainmen*, 318 U.S. 1, 6 (1943), Congress did through Public Law 91-226 undertake governmental regulation of the rates of pay, rules, or working conditions. Under these circumstances, the statute did more than provide a means by which agreement could be reached. Jurisdiction over the mandated settlement would not be, therefore, in the Adjustment Board, but necessarily rests in the federal courts.

designated "main" tracks as "yard" tracks. The court rejected the carrier's argument that a 1953 contract superseded the agreement of 1942, that the redesignation of the tracks made the full crew law inapplicable, that the dispute had reduced itself into a question of the proper interpretation of the terms of the collective agreement, and that the courts therefore lacked jurisdiction. On the basis of this Court's decision in *Shore Line, supra,* 396 U.S. 142, the Sixth Circuit ruled that the district court had authority to enjoin the railroad's "unilateral self-help measures" until the status quo provisions of the Act had been exhausted. Similarly, in *United Transp. Union, Local 63E v. Penn Central Co.,* 443 F.2d 131 (6th Cir. 1971), *cert. denied,* 404 U.S. 938 (1971), the Sixth Circuit stated the carrier's unilateral change in the form of crew boards was not a mere dispute over the meaning of the language in the collective agreement. Upholding the status quo injunction, it held the dispute between the parties concerned an attempt by the defendant to change the very terms of the contract, and consequently the railroad's actions amounted to a change in working conditions and created a major dispute. Although both decisions are predicated on a reading of Sections 2, Seventh and 6, it is apparent that the ultimate rulings are more appropriately based upon the railroad's failure to comply with its duty to bargain collectively, a determination that an adjustment board could not make. In the case now before this Court, however, the union was denied such relief on the basis that the dispute was minor and an adjustment board could grant an adequate remedy. Thus, these decisions are squarely in conflict.

b. The decision below also is directly in conflict with two decisions of the Ninth Circuit, *Railway Conductors & Brake. v. Spokane, P. & S. Ry. Co.,* 366 F.2d 99 (9th Cir. 1966), *cert. denied,* 385 U.S. 1025 (1966); *Butte, A. & P.*

Ry. Co. v. Locomotive Firemen & Eng., 268 F.2d 54 (9th Cir. 1959), *cert. denied*, 361 U.S. 864 (1959). In those cases, the Ninth Circuit found major disputes to exist under factual circumstances comparable to those present here, and required those railroads to exhaust the notice and negotiation provisions of the Act. As here, the former case involved a hastily-drafted eleventh-hour memorandum. There, Congress had avoided a nationwide rail strike by an enactment requiring compulsory arbitration of two issues between the carriers and the unions. The remaining issues were the subject of a so-called "White House Agreement." When subsequently the parties could not agree on the meaning of "suitable lodging" and "an equitable allowance in lieu thereof", terms incorporated in the mediated agreement, the railroad, as did Terminal in this case, unilaterally placed into effect *its interpretation*. As a result of the union's threatened strike, the carrier submitted the matter to the Adjustment Board and sought an injunction against the strike. Though recognizing the dispute could have been submitted to arbitration, the Ninth Circuit did not believe that the very loose and general language of the "White House Agreement" was readily interpretable, and found the dispute would be more appropriately handled under the major dispute procedures of the Act. The factual conditions in the instant case lead to the same inescapable conclusion — the parties had never completed the major dispute procedures as to the subject matter involved and Terminal cannot now abandon those procedures through the unilateral extension of Public Law 91-226. A reading of those opinions reveals that the Ninth Circuit believed the railroad had violated its duty to bargain collectively. Those decisions are contrary to the decision below.

c. The decision below also is contrary to two decisions of the Eighth Circuit. In *Rolfes v. Dwellingham*,

198 F.2d 591 (8th Cir. 1952), Section 6 was found to have been violated by the railroad's failure to serve the notice required by that section before displacing waiters by dining car stewards. And in *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964 (8th Cir. 1967), the Eighth Circuit enforced the Labor Board's order finding that the employer had violated its duty to bargain by unilaterally reducing wages despite the employer's reliance upon an interpretation of the collective bargaining agreement to justify its action. Recognizing the need to implement the union's rights along with preserving express statutory rights, the court concluded "the presence of a contract provision for both grievance procedure and arbitration does not eliminate Board jurisdiction of an unfair labor practice . . . ." *Id.* at 970. In that Terminal failed to serve notice and in that the duty to bargain prevents unilateral action notwithstanding that the dispute could be arbitrated, these decisions are irreconcilable with the determination below.

d. In the Fifth Circuit also the justiciability and enforcement of claims under Section 2, First is clearly established. In *United Industrial Workers v. Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), the Fifth Circuit found the dispute involving the non-discriminatorily motivated lease of certain facilities to another company during the life of the bargaining contract was a major dispute as to which the carrier had thereby effected a change in working conditions in violation of Section 2, Seventh, and as to which the carrier was required to give the union notice pursuant to Section 6. Moreover, the Fifth Circuit determined, contrary to the decision below, that no outside tribunal, such as an adjustment board, has the authority to consider violations of those statutory provisions.

e. The Court of Appeals for the Seventh Circuit has also held, following this Court's decision in *Shore Line*,

supra, that a railroad may not change existing conditions of work unilaterally. *Illinois Central R. Co. v. Locomotive Engineers*, 422 F.2d 593 (7th Cir. 1970). In that case, the carrier over protest of the union established a program to have supervisory personnel ride in the cabs of locomotives, who would require the locomotive engineers to relinquish the controls, turn over to trainees operation of the locomotive, and subject the engineers to discharge for refusing to do so. The court found that the change gave rise to the negotiation and mediation processes of the Act. On that basis, the Seventh Circuit affirmed the denial of injunctive relief to restrain the Brotherhood from striking over the carrier's unilateral action. If a union is entitled to strike under such circumstances, an injunction against the railroad's action, as requested in this case, would also further the Congressional purposes set forth in the Act. Clearly, the two decisions are therefore in conflict.

f. In addition, the decision below conflicts directly with two decisions of the Second Circuit. In *Manning v. American Airlines*, 329 F.2d 32 (2d Cir. 1964), *cert. denied*, 379 U.S. 817 (1964), the court affirmed the district court's order enjoining the airline from unilaterally discontinuing union dues checkoff even though the checkoff agreement had expired. The air carrier was required to continue all working conditions until changed pursuant to the notice and negotiation provisions of the Act. Although this decision refers to Section 6, it is apparent that the ruling is based on the court's view of the duty to bargain in good faith. In holding that the airline was required to serve notice and to negotiate before making the desired changes, the court concluded:

> "The purpose of Section 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted . . ."

Under the decision below, however, the carrier may make changes in major conditions of employment without compliance with the mandatory provisions of the Act.

And in a more recent decision, *Seaboard World Airlines v. Transport Workers*, 425 F.2d 1086 (2d Cir. 1970), the Second Circuit held Section 2, First to be enforceable by injunction. There the carrier refused to bargain on the union's attempted reopener on the basis that the collective agreement contained a permanent prohibition on the subject of the demand. Although finding the union's strike over this refusal to have been properly enjoined temporarily, the Second Circuit modified the injunction by eliminating the lower court's referral of the matter to an adjustment board and in lieu thereof provided for prompt determination of the union's claim of illegality by the district court.

g. In addition, the decision below is contrary to the direction taken in a district court case, which as far as we have been able to ascertain, is the only other case in which a declaration was requested on the question whether a settlement mandated by Congress applied to a particular group of employees or to a specific railroad. In *Locomotive Engineers, Div. 700 v. Arbitration Bd. 282*, 223 F. Supp. 377, 244 F. Supp. 336 (D.D.C. 1963), the district court for the District of Columbia held that the courts have exclusive jurisdiction to determine this issue. After reviewing the factual background and the legislative proceedings, the district court held that neither the railroad nor its employees were parties to the dispute with which Congress was concerned, although the same bargaining subjects were involved, and that they were not parties to the controversy over which the arbitration tribunal had jurisdiction.

3. The decision below also is contrary to the long-standing application of the good faith bargaining provisions of the National Labor Relations Act by the National Labor Relations Board. Again recognizing the limitations upon the reading of that Act in Railway Labor Act cases, we nevertheless believe that those decisions merit consideration in the instant case for the Labor Board has been faced with the question presented here many times in the past in performing its duties.

For example, in *Unit Drop Forge Div., Eaton, Yale & Towne*, 171 NLRB No. 73 (1968), *enforced*, 412 F.2d 108 (7th Cir. 1969), the Board held the employer had acted unilaterally in derogation of its duty to bargain collectively by changing its method of operation thereby reducing its employees' earnings. Although the employer contended that the collective agreement with the union "sanctioned" its unilateral actions, the Board found the union had not waived its right to notice of and negotiations on the changes merely because the agreement provided that each party waived its right to bargain collectively on any subject, whether or not referred to in the agreement or within the knowledge or contemplation of the parties at the time of negotiations. Moreover, the existence of a grievance-arbitration procedure in the agreement did not indicate a waiver, nor did the availability of those procedures preclude the Board from asserting jurisdiction over the employer's unfair labor practice. The Board's decision appears to have been based on its conclusion that the controversy was not beyond its competence to resolve and, if left unresolved, might have a continuing impact on the bargaining relationship. Unlike the court below, the Board was unwilling to withhold its determination and to send the parties elsewhere. Therefore, it fashioned a meaningful remedy suited to the practical needs of the situation.

And, in *Standard Oil Co. (Ohio)*, 174 NLRB No. 33 (1969), the Board held that an employer unlawfully discredited the union and impaired the bargaining process by unilaterally publishing and implementing terms and conditions of employment inconsistent with an existing collective agreement. Though the agreement provided for its reopening and the employer argued that its unilateral action was justified since the union refused to agree to the changes in negotiations on the employer's reopener, the Board held the employer was not entitled to change the pre-existing commitments during the contract term.

The Board's decisions abundantly establish two principles applicable herein. First, there is no duty upon either party to bargain about proposals to make changes in a collective agreement that would take effect during its term. See Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1110-1116 (1950). Second, the statutory right of employees to bargain collectively, through representatives of their choosing, may be waived, but only if explicitly contained in an existing agreement reached after genuine collective bargaining and if clearly and unmistakably established. See NLRB, 29th Ann. Rep. (1964) pp. 78-79; 30th Ann. Rep. (1965), pp. 77-78.

In the instant case, the understanding unequivocally establishes that neither party was obligated to bargain prior to January 1, 1970 upon any proposed change in the subjects referred to in the understanding or on any subject, directly or indirectly, referred to in the parties' initial demands. In fact, the carriers, including Terminal, had agreed to withdraw their demands for a composite mechanic and to merge the work classifications of all of the shopcrafts (J.A. 20, 26). Moreover, the parties understood that any agreements would be a full disposition of

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those proposals, and the working conditions created would remain in effect "until changed or modified in accordance with the provisions of the Railway Labor Act" (J.A. 26). If anything, the dispute, as to which the instant problem is a part, was a continuing one, and neither party understood that it had been resolved in the fashion that Terminal's action later took. Under the rationale of the Board decisions, the subsequent unilateral actions of Terminal, in the context of these circumstances, is surely disruptive of the bargaining processes and, conversely, is not conducive to the avoidance of any interruption to commerce. *Chicago & N. W. R. Co. v. United Transp. Union,* 402 U.S. at 576.

4. Moreover, we think it reasonably clear on the face of the Railway Labor Act that the decision below was in error—i.e., that Sections 2, First and Seventh, and 6, when read as a whole, mean exactly what they say. Therefore, all carriers have a duty to "maintain" agreements in order to avoid the interruption of commerce; and conversely shall not change working conditions except by agreement or after fulfilling the notice and negotiation requirements contained in Section 6. Nothing can be more disruptive of the legislative scheme, and can create greater turmoil among the rank and file, than to permit the railroad to unilaterally change major conditions of employment. It is a well known fact that precipitous changes made by management in rules of employment or working conditions are frequently the cause of serious disputes between labor and management, and lead to strike threats and strike action.

The unilateral action of Terminal establishes only its impatience with the long and drawn out features of the Act, which were purposely inserted to prevent freewheeling action by either of the parties. The take it or leave it attitude of Terminal also sustains the conclusion that

it acted in disdain of the authority of the bargaining representative, which could only serve to reduce the latter's influence in the shop and cause its members to look elsewhere for representation. As this Court said in *NLRB v. Insurance Agents' Int'l.*, 361 U.S. 477, 484-485 (1960), "the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." Thus, the relationship of the railway union to the bargaining process is a continuing one, and is not limited to the execution of agreements, when management sees fit to follow that process, but not so when management decides to act unilaterally during the period prior to the next round of negotiations. In view of Congressional involvement in railroad labor disputes, and there is no indication this practice will be terminated in the near future, these problems will undoubtedly disturb labor relations in the railroad industry until the full status and function of the railway labor union is settled by this Court.

We respectfully submit that this case warrants review by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

(Decided December 19, 1972)

No. 24,880

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
Appellant,

v.

WASHINGTON TERMINAL COMPANY

Appeal from the United States District Court
for the District of Columbia

Before TAMM and MACKINNON, *Circuit Judges,* and RONALD N. DAVIES* *United States Senior District Judge* for the District of North Dakota.

MACKINNON, *Circuit Judge:* The International Brotherhood of Electrical Workers (IBEW or Electricians) brings this appeal from an order entered by the District Court, on October 19, 1970, denying a preliminary injunction against the Washington Terminal Company (Company) in a railway labor dispute. The origin of the dispute lies in that round of contract negotiations between the Nation's railroads and four of the six railroad shop craft unions [1] which was ultimately concluded only

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

upon enactment by Congress of Public Law 91-226 on April 9, 1970.[2]

Public Law 91-226 placed into effect—"as though arrived at by agreement of the parties under the Railway Labor Act"—a Memorandum of Understanding (hereinafter Memorandum) relating to the dispute between the parties that had been agreed to by the bargaining representatives of all four parties to the negotiation, but which had failed of ratification by the membership of one of the unions, the Sheet Metal Workers. This Memorandum included an "incidental work rule" by which the bargaining representatives of the unions agreed, subject to ratification by their respective members, to relax the formerly rigid classification of work rules to the extent of permitting a carefully limited crossing of normal craft lines at "running repair work locations" on the Nation's railroads for the performance of tasks "incidental" to a "main work assignment."[3]

Following the enactment of Public Law 91-226 the

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[1] At the time of these negotiations the "standard railroad" was composed of employees represented by nineteen (19) separate labor organizations. Six of these nineteen unions represent those employees who perform the bulk of the maintenance and repair functions on the railroads' operating equipment; these are the so-called "shop craft unions." The four shop craft unions that were involved in the negotiations leading to the present dispute were the IBEW (or Electricians), the International Association of Machinists and Aerospace Workers (IAM, or Machinists), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBBB, or Boilermakers and Blacksmiths), and the Sheet Metal Workers International Association (SMWI, or Sheet Metal Workers). The two shop craft unions who did not participate in these negotiations were the Brotherhood of Railway Carmen (BRC, or Carmen), and the International Brotherhood of Firemen and Oilers (Firemen).

[2] Pub. L 91-226, April 9, 1970, 84 Stat. 118 (1970); *see* n.14, *infra*.

[3] *See* note 8 *infra* and accompanying text for the complete text of the rule and a more complete discussion of the agreement thereto.

railroads concluded a national agreement with the Brotherhood of Railway Carmen (Carmen), one of the other shop craft unions, containing an identically phrased "incidental work rule." Shortly after consummation of this agreement with the Carmen the Washington Terminal Company began assigning "incidental work" normally falling within the Electricians' classification to employees belonging to the Carmen's union. The Electricians immediately complained to the Company and, after direct discussions had led to no satisfactory resolution, this suit was initiated by the IBEW (Electricians) on September 15, 1970. The objective of the litigation is to prevent the Company from continuing to use Carmen to perform any incidental work of Electricians. On September 29, the District Court denied a temporary restraining order, and after hearing oral argument on October 6, the District Judge ruled from the bench that a preliminary injunction against the Company was not warranted. An order formally stating that conclusion was entered October 19, and this appeal followed. We believe the request for preliminary injunction was properly denied and accordingly we affirm the order of the District Court.

I.

A. National Negotiations Leading to Passage of Public Law 91-226 [4]

This dispute represents another episode in the long-running struggle over work rules between the nation's railroads and the labor organizations who represent railroad employees. Negotiations were initiated in November 1968 when four of the shop craft unions—the Machinists, Electricians, Boilermakers and Sheet Metal Workers (IAM, IBEW, IBBB and SMWI)—and the railroads exchanged

[4] A chronology of this dispute is provided as an Appendix to this opinion.

notices pursuant to section 6 of the Railway Labor Act.[5] The unions' notices requested only increases in wage rates; the railroads' notices proposed a broad range of changes in work rules, including a rule which would eliminate work classification distinctions between the four unions and create, in essence, a composite mechanic's classification. Bargaining on these proposals proceeded through the entire range of procedures provided by the Railway Labor Act,[6] with the only appreciable progress coming through Emergency Board No. 176's recommendations for narrowing the issues to be resolved.

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[5] Railway Labor Act of 1926, § 6, ch. 347, 44 Stat. 582, as amended, 45 U.S.C. § 156 (1970). Section 6 provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended *change in agreements* affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. (Emphasis added.)

[6] These procedures of the Railway Labor Act were summarized by Mr. Justice Harlan in Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 294 U.S. 369, 378 (1969):

> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration,

(Footnote continued on following page)

Having exhausted the procedures of the Act, [7] and in a last ditch attempt to avoid the consequences of a nationwide rail strike, intensive bargaining through the mediation efforts of the Department of Labor was commenced. The major breakthrough in these negotiations occurred when the Unions presented a draft of an "incidental work rule" in substantially the same form as it appeared in the final memorandum. Following this dramatic shift in the unions' position the carriers responded with significantly increased wage offers and a Memorandum of Understanding was reached and initialed by all parties on December 4, 1969. However, by prior agreement among the unions this Memorandum was submitted to each union's membership for ratification with the understanding that all four unions must ratify or none would sign a formal contract embodying the terms of the Memorandum. On December 17, the ratification votes were announced; the Sheet Metal Workers had rejected the agreement.

The key to this agreement, the source of dissatisfaction to the Sheet Metal Workers, and the source of the dispute before us here, was the "incidental work rule."

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which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—"the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration." *Florida E. C. R.R. v. Railroad Trainmen*, 336 F.2d 172, 181 (1964) . . .

[7] See Chronology in the Appendix.

The Incidental Work Rule

The principal part of the rule provides [8]:

> At running repair work locations which are not designated as outlying points where a mechanic or mechanics of a craft or crafts are performing a work assignment, the completion of which calls for the performance of "incidental work" (as hereinafter defined) covered by the classification of work rules of another craft or crafts, such mechanic or mechanics may be required, so far as they are capable, to perform such incidental work provided it does not comprise a preponderant part of the total amount of work involved in the assignment. Work shall be regarded as "incidental" when it involves the removal and replacing or the disconnecting and connecting of parts and appliances such as wires, piping, covers, shielding and other appurtenances from or near the main work assignment in order to accomplish that assignment. Incidental work shall be considered to comprise a preponderant part of the assignment when the time normally required to accomplish it exceeds the time normally required to accomplish the main work assignment. In no instance will the work of overhauling, repairing, modifying or otherwise improving equipment be regarded as incidental.

The carriers considered this rule to be both a major milestone in their efforts to achieve more efficient utilization of manpower, and the quid pro quo essential to the wage increases they had offered. The Sheet Metal Workers were unwilling to consider any lower wages than those offered, yet their opposition to the incidental work rule was so implacable that they contended no wage increase would be sufficient to induce them to accept the rule.

Faced with these respective bargaining positions, fur-

[8] A second paragraph dealt with procedures to be followed in the event of a dispute over whether or not the alleged "incidental work" comprises a "preponderant part" of the work assignment.

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ther Labor Department mediation efforts were futile and the parties prepared to resort to self-help. The unions struck the Union Pacific on January 31, 1970; the railroads promptly announced a nationwide lockout to take effect at 10:00 p.m. the same date; and both parties brought suit in the United States District Court for the District of Columbia seeking to restrain the action of the other. Temporary restraining orders were entered that afternoon halting the strike and forestalling the lockout.[9] These orders were subsequently extended through March 2, when a preliminary injunction against selective strikes by the unions was issued.[10]

Negotiations sponsored by the Labor Department continued during this period, with two significant changes taking place. Recognizing the implacable opposition of the Sheet Metal Workers to the agreement reached in December, the other three unions—Electricians, Machinists and Boilermakers—offered to sign a contract embodying the terms of the Memorandum without the Sheet Metal Workers joining. When the carriers rejected this offer, the Carmen indicated their willingness to sign such a contract and the representatives of the three other unions offered to replace the Sheet Metal Workers with the Carmen and sign the contract with those four unions. This proffered agreement without the Sheet Metal Workers was also rejected by the carriers. Meanwhile, the Sheet Metal Workers withdrew authority from the national union bargaining team to represent them, and they declared that any further negotiations would have to be conducted with one of their own officers.

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[9] Int'l Ass'n of Machinists v. Nat'l Ry. Labor Conf., 310 F Supp. 904 (D.D.C. 1970).

[10] *Id.* This opinion denied as moot the requested injunctive relief against the railroads' threatened lockout, since the lockout had been intended solely as a retaliatory measure against "whipsaw" selective strikes by the unions.

When the District Court announced its injunction against selective strikes on March 2, 1970, all of the original four unions declared their intention to commence a nationwide rail strike at midnight on March 4th. The President responded to this threat to the nation's economic well-being by requesting legislation from Congress that would place the December 4, 1969 Memorandum of Understanding into effect as the contract between the parties. [11] Congress, however, was unwilling, on such short notice, to force a contract on the still recalcitrant Sheet

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[11] PRESIDENTIAL MESSAGE

To the Congress of the United States:

Once again this nation is on the brink of a nationwide rail strike.

A nationwide stoppage of rail service would cause hardship to human beings and harm our economy, and must not be permitted to take place.

In two previous disputes, when the railroad employees and unions have not been able to settle their differences, the President has recommended, and the Congress has enacted, special legislation to avert a stoppage. I am taking similar action to protect the public interest today.

The legislation I propose is closely related to the facts of this dispute. After all the procedures of the Railway Labor Act had been exhausted, and after extensive mediation under the auspices of the Secretary of Labor, the parties finally reached an agreement incorporated in a Memorandum of Understanding dated December 4, 1969. That Memorandum was ratified by an overall majority of all the members voting as well as by the majority of those voting in three of the four unions.

However, the majority of the voting members of one union the Sheetmetal Workers' International Association, failed to ratify the Memorandum. I am forwarding to you today *legislation that merely makes that Memorandum the contract between the parties.* We must not submit to the chaos of a nationwide rail stoppage because a minority of the affected workers rejected a contract agreed to by their leadership. The public interest comes first.

Four days ago, I sent to the Congress a measure to protect the public interest in cases where a strike or lockout in the transportation industry imperils the national health and safety. In that message I stressed two principles: first, that the health and safety of the Nation must be protected against damaging

(Footnote continued on following page)

Metal Workers. Thus Public Law 91-203,[12] enacted on March 4, 1970, froze the existing situation by prohibiting either a strike or a lockout prior to April 11, 1970.

During the next month further negotiations were held under the mediation efforts of both the Labor Department and members of Congress. The Sheet Metal Workers union remained adamant in its opposition to the incidental work rule and the railroads refused to budge from their insistence that the wage increases offered were immutably tied to that rule and that any agreement must cover all four of the unions that were the original parties to the

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work stoppages; second, that collective bargaining should be as free as possible from Government interference.

The legislation I am submitting with this message to resolve this dispute, abides by those two principles. We will protect the national interest, and we will limit Government interference to enforcing the contract to which responsible agents of the parties agreed.

I urge the Congress to act quickly on my proposal, so that a crippling stoppage can be averted and the Nation's travellers and shippers can depend on uninterrupted service.

RICHARD NIXON.

THE WHITE HOUSE, *March 3, 1970.*

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 3, 1970.

HON. JOHN W. MCCORMACK,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: I am transmitting herewith draft legislation to carry out the President's recommendations for averting the threatened nationwide railroad dispute.

The draft legislation provides that the memorandum of understanding agreed to by the carriers and the representatives of the shop craft unions shall have the effect of a contract between the parties.

In view of the urgency of the situation, I recommend that this matter be given immediate and favorable consideration.

Sincerely,

GEORGE P. SHULTZ, *Secretary of Labor.*

H.R. REP. No. 91-984, 91st Cong., 2d Sess. 4-5 (1970) (Emphasis added).

[12] 84 Stat. 22.

dispute. Recognizing this impasse, both the House and Senate committees considered the limited range of alternatives available to them and ultimately recommended passage of the President's March 3rd proposal. [13] In April 9, 1970, Senate Joint Resolution 91-190 was enacted as Public Law 91-226. The operative language of the Joint Resolution provided:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the memorandum of understanding, dated December 4, 1969, shall have the same effect (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.) and that February 19, 1970, shall be deemed the "date of notification of ratification" as used in this memorandum of understanding. [14]

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[13] S. REP. No. 91-758, 91st Cong., 2d Sess. (1970); H.R. REP. No. 91-984, 91st Cong., 2d Sess. (1970).

[14] Pub. L. 91-226, 84 Stat. 118. The full text of the Resolution is as follows:

JOINT RESOLUTION

To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees.

Whereas the labor dispute between the carriers represented by the National Railway Labor Conference and certain of their employees represented by the International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers' International Association; International Brotherhood of Electrical Workers functioning through the Employees' Conference Committee, labor organizations, threatens essential transportation services of the Nation; and

Whereas all the procedures for resolving such dispute under the Railway Labor Act have been exhausted; and

Whereas the representatives of all parties to this dispute reached agreement on all outstanding issues and entered into a memorandum of understanding, dated December 4, 1969; and

Whereas the terms of the memorandum of understanding, dated December 4, 1969, were ratified by the overwhelming

(Footnote continued on following page)

That a joint resolution was used to accomplish the intended result does not detract from the legislative character of the action. Congress legislates through "acts" and "joint resolutions." [15] Resolutions are recognized in the Constitution, [16] and a joint resolution is a bill within the meaning of the congressional rules and the processes of the Congress. [17] With the exception of joint resolutions proposing amendments to the Constitution, [18] all such resolutions

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majority of all employees voting and by a majority of employees in three out of the four labor organizations party to the dispute; and

Whereas the failure of ratification resulted from the concern of a relatively small group of workers concerning the impact of one provision of the agreement; and

Whereas this failure of ratification has resulted in a threatened nationwide cessation of essential rail transportation services; and

Whereas the memorandum of understanding, dated December 4, 1969, permits the service of notices or proposals for changes under the Railway Labor Act on September 1, 1970, to become effective on or after January 1, 1971; and

Whereas the national interest, including the national health and defense, requires that transportation services essential to interstate commerce is maintained; and

Whereas the Congress finds that an emergency measure is essential to security and continuity of transportation services: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the memorandum of understanding, dated December 4, 1969, shall have the same effect (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.) and that February 19, 1970, shall be deemed the "date of notification of ratification" as used in this memorandum of understanding.

[15] IV Hind's Precedents of the House of Representatives § 3371 (1907).

[16] U.S. CONST. Art. I, § 7, cl. 3.

[17] Jefferson's Manual and Rules of the U.S. House of Representatives § 397, p. 186 (1971). IV Hind's Precedents, *supra*, § 3375.

[18] V Hind's Precedents, *supra*, § 7029.

are sent to the President for approval and have the full force of law. They are ordinarily used for what may be called the incidental, unusual, or inferior purposes of legislating but are used as well for the highest style of legislation—proposing amendments to the Constitution and abrogating treaties. [19]

B. *Local Events Subsequent to Public Law 91-226*

Upon passage of Public Law 91-226 the Washington Terminal Company began assigning incidental work among members of the four unions whose representatives had initialed the December 4, 1969 memorandum. The Company also, bargaining nationally along with the other railroads, signed an agreement with the Carmen that contained an incidental work rule that was identical to the rule in the Memorandum of Understanding that Congress had passed into effect by Public Law 91-226. Shortly after April 24, 1970, when this agreement with the Carmen took effect, the Company assigned as incidental work under the rule some electrical work to carmen.

On May 1, Mr. S. A. Lloyd, General Chairman of the Electricians' local at the Company, filed a time claim, contending that "This work properly belongs to the electricians." App. 57. [20] The Company denied this claim in a letter dated May 28 from Mr. J. E. McCabe, Master Mechanic, on the ground that the work was properly performed in accordance with the incidental work rule contained in the agreement implemented by Public Law 91-226. App. 56.

The following day, May 29, Mr. Lloyd wrote the Manager of the Company as follows:

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[19] IV Hind's Precedents, *supra*, § 3372; Jefferson's Manual, *supra*, §§ 393, 599, pp. 186, 293. For the general practices with respect to the use of joint resolutions, see IV Hind's Precedents, *supra*, §§ 3370-3373.

[20] The notation "App." is used to refer to the Appendix to the briefs submitted by the parties on this appeal.

The practice of assigning work belonging to electricians at the car shop to the Carmen's Craft is in violation of Title I, Section 2, Paragraph 7 of the Railway Labor Act and constitutes a major dispute.

Unless this practice is stopped, it will be necessary to resort to self help.

App. 12. [21] Upon receipt of this strike threat, a meeting with Mr. Lloyd was arranged. The Company explained its contention that the dispute was a "minor" one concerning interpretation of the incidental work rule, and urged Mr. Lloyd to follow the procedures mandated by Section 3 of the Railway Labor Act. [22] However, the Com-

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[21] Section 2, Seventh of the Railway Labor Act, as amended, 45 U.S.C. § 152 (1970) provides:

Change in pay, rules, or working conditions contrary to agreement or section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

[22] Section 3 of the Act, 45 U.S.C. § 153 (1970), sets forth the procedures for resolution of grievances, contract interpretation, and other "minor disputes." These procedures include a form of binding arbitration through the National Railroad Adjustment Board. The Second Division of that Board consists of ten members, five of whom are selected by the carriers and five by the national labor organizations of the employees, and the jurisdiction of this division extends to disputes involving the shop crafts. 45 U.S.C. § 153 (h). 45 U.S.C. § 153 (i) provides:

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

The statute further provides "That final awards [by any division of the Adjustment Board] as to any such dispute. . . ." (45 U.S.C. § 153 (m)). *See* Part IV of this opinion, *infra*, for further description and discussion of these procedures.

pany agreed to stop assigning incidental work to carmen pending a further meeting of national bargaining representatives of the railroads and the four unions who were parties to the December 4, 1969 memorandum. That meeting was scheduled for July 8, 1970.

At approximately the same time as the conference between Mr. Lloyd and the Washington Terminal Company, the Southern Pacific began assigning incidental electrical work to carmen. The Electricians' local at that railroad protested, and after a conference failed to resolve the dispute the union announced that a strike of the Southern Pacific would take place on June 29, 1970. On that date the United States District Court for the Eastern District of California issued a restraining order, followed on July 9, 1970 with a preliminary injunction against the union.[23] In the order granting that injunction the United States District Court in California found that

> the disputes and grievances which are the basis of defendant's strike do not concern changes in agreements, but instead concern the interpretation and application of existing agreements covering rates of pay, rules and working conditions and are minor disputes for which defendants have an appropriate administrative procedure for handling with plaintiff.

App. 67. Accordingly, the order was made conditional

> upon the submission of this dispute, within five (5) days of the date hereof, to the National Railroad Adjustment Board, or a Public Law Board [24] as provided for in the Railway Labor Act.

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[23] Southern Pac. Transp. Co. v. IBEW, Civ. No. S-1699 (E.D. Cal., July 9, 1970).

[24] The term "Public Law Board" is not used in the statute but refers generally to those special boards of adjustment authorized by 45 U.S.C. § 153, Second. These boards which generally come into existence by mutual agreement of the parties to decide system, group or regional issues, perform the same function as the Adjustment Board, but are composed of three members and generally operate as a subordinate version of the National Railroad Adjustment Board. *See generally*, 48 AM.JUR. 2d *Labor and Labor Relations* § 1145 (1970).

App. 69. The Southern Pacific subsequently submitted the dispute to the Adjustment Board, where it remains pending at this date. [25]

The July 8 meeting of the national bargaining representatives failed to achieve any further clarification or agreement concerning the incidental work rule. However, relying in large part on the fact that the District Court in the Southern Pacific litigation did not require that railroad to stop using carmen to perform incidental work, Washington-Terminal informed Mr. Lloyd that the Company intended to resume the practice of assigning incidental work to carmen. Approximately 17 such assignments were made from August 3-September 14, 1970. App. 63.

This case was initiated on September 15, 1970 when the Electricians Union (IBEW) filed its complaint requesting declaratory and injunctive relief against the Company's use of anyone other than members of the Machinists, Boilermakers or Sheet Metal Workers unions to perform incidental work in the craft of electrical work. After denying a requested temporary restraining order on September 29, argument was heard on the Union's motion for a preliminary injunction on October 6, 1970. At the conclusion of this hearing the District Court ruled from the bench, denying the requested injunction and on October 19, 1970 filed written findings, conclusions and an order

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[25] On July 31, 1970, the Electricians filed an answer and counterclaim in the Southern Pacific litigation. The counterclaim was virtually a verbatim copy of the complaint in this action. The District Court heard argument on the counterclaim on August 17, and denied it from the bench on October 5—the day before the hearing in the District Court on the case before us here. Upon request of the Electricians a written order was entered on November 6. IBEW has appealed both the order granting preliminary injunction and the order denying its counterclaim; these appeals are docketed as Nos. 26,696 and 71-1390 in the U.S. Court of Appeals for the Ninth Circuit.

denying the preliminary injunction.[26]

The denial, as formulated in the written findings of

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[26] The transcript of this ruling may be found at App. 73-74. The order itself, including the formal findings of fact and conclusions of law, provided:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION.

(Filed October 19, 1970.)

Upon consideration of the Motion of plaintiff for a Preliminary Injunction and the Opposition of the defendant thereto, and upon further consideration of the record and file in this cause, including the various affidavits and exhibits, together with the arguments of counsel in open Court, the Court hereby makes the following:

FINDINGS OF FACT

1. That the defendant's implementation of the "incidental work rule" contained in the Memorandum of Understanding of December 4, 1969, as implemented by Public Law 91-226, and the plaintiff's challenge thereto does not involve a change in an agreement, but instead involves a question of the interpretation and application of an existing agreement covering rates of pay, rules and working conditions;

2. That the plaintiff has an adequate administrative remedy for the resolution of the issue raised herein pursuant to the provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and more particularly pursuant to 45 U.S.C. § 153 First (i). In this respect, the Court finds that the National Railroad Adjustment Board would be particularly qualified to handle a dispute of the type involved herein.

3. That assuming *arguendo* that the question of coverage of the Memorandum of Understanding, implemented by Public Law 91-226, was a proper one for construction by the Court, it would appear that the Court would find that the intent of the Congress assumed a broad coverage of the same, as opposed to a limited application to only those several shop craft unions involved in the negotiations culminating in said Memorandum of Understanding.

4. That in related litigation, the United States District Court for the Eastern District of California (in *Southern Pacific Transportation Company v. International Brotherhood of Electrical Workers, et al.* Civil No. S-1699) has found the dispute to involve the interpretation and application of an existing agreement, and ordered the dispute submitted to the National Railway Adjustment Board, which has been done by the carrier in that case.

5. That by virtue of the foregoing, plaintiff has failed

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October 19, 1970,[27] was based on the District Court's assessment that the Electricians had not shown a probable likelihood of ultimate success on the merits to warrant an injunction. Three factors were singled out as leading to this conclusion:

> First, that the Company's implementation of the "incidental work rule" under its agreement with the Carmen and under Public Law 91-226 implementing the Memorandum of Agreement, and the electricians' challenge thereto, involves a "minor dispute" only and not a change in agreement.
>
> Second, that the electricians had an adequate administrative remedy for the resolution of the issue by the National Railroad Adjustment Board.
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> Third, that if the District Court were to interpret the Act it would hold that Congress intended the Memorandum of Agreement to apply "across the board," as opposed to a limited application to only those [four] . . . craft unions involved in the negotiations culminating in [the] . . . Memorandum of Understanding."

In addition the court found the similar conclusions of the

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to show a probable likelihood of ultimate success in this litigation.

CONCLUSIONS OF LAW

1. That the issue presented herein constitutes a "minor dispute" within the meaning of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which provides an appropriate and exclusive forum for the resolution thereof.

2. That plaintiff has failed to make the requisite showing that would entitle it to the extraordinary relief which it seeks.

ORDER

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is, by the Court, this 19 day of October, 1970.

ORDERED, that the Motion of the plaintiff for a Preliminary Injunction be, and the same is hereby denied.

App. 75-76.

[27] *See* n.26.

United States District Court in California in the Southern Pacific case to be quite persuasive.

We affirm the order denying injunctive relief on the sole ground that the dispute is one which should be resolved under the "minor dispute" procedures of the Railway Labor Act. With this independent ground for affirmance, we need not decide the issues presented by the arguments of the parties concerning the proper interpretation of the Memorandum of Agreement or the precedential role of the Southern Pacific decision in the District Court's consideration of this case.

II

This court has recently considered the scope of our review of orders pertaining to preliminary injunctions in *Delaware & H. Ry. v. United Transp. Union*, 146 U.S. App. D.C. 142, 158-61, 450 F.2d 603, 619-22 (1971). We discussed there the particular importance of the trial court's assessment of the movant's probability of success on the merits, and we noted that frequently the finding of irreparable injury on which an injunction is based "depends on an appraisal of the validity, or at least the probable validity, of the legal premise underlying the claim of right in jeopardy of impairment." 146 U.S.App.D.C. at 158-59, 450 F. 2d at 619-20. This is such a case, for the Electricians contend that the Company's assignment of incidental electrical work to carmen is a unilateral change in major conditions of employment which can only be made under the section 6 notice and negotiation procedures of the Railway Labor Act. The District Court concluded that the Electricians were unlikely to be able to establish the validity of that legal premise in a trial on the merits, because while the assignment of incidental electrical work to the Carmen was a change from the practices permitted under the old agreements, it did not constitute a change from

practices that were arguably permitted by the incidental work rule as set forth in the Understanding implemented by Congress and in the Agreement with the Carmen. Actually the unilateral change in major conditions of employment was made previously by Congress when it implemented the Memorandum of Agreement by legislation not by the railroad when it acted in conformance therewith. In *Delaware & H.Ry.* we held:

> Insofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court. The matter stands in a different posture from that involved when there is no question or disagreement as to the legal principle involved, and the element of probability of success on the merits depends on a forecast as to the shape of the facts likely to emerge at trial. If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound.

146 U.S.App.D.C. at 159, 450 F.2d at 620.

III

One of the reasons the District Court found the Electricians' chances of success on the merits to be doubtful was its conclusion that if it were to interpret Public Law 91-226 [28] it would be required to hold that Congress in-

[28] The legislative history of Public Law 91-226 includes the materials related to Public Law 91-203, the measure enacted on March 4, 1970 to delay the strike pending further negotiations and congressional consideration of alternatives for resolving the dispute. The earlier law was introduced as S.J. Res. 91-178 and H.J. Res. 91-1112, and was passed as S.J. Res. 91-180. Public Law 91-226 had been considered by the House as H.J. Res. 91-1124, and by the Senate as S.J. Res. 91-190. Three volumes of hearings were published. The House hearings of March 4, 23, 24, 25, and April 7, 1970 are published in

(Footnote continued on following page)

tended the Act to apply not only to personnel of the four shop craft unions that were negotiating but also "across the board" to include personnel of the other two shop "craft" unions as well. App. 73. Thus, in the view of the trial court, the legal premise urged by the Electricians was barred by Public Law 91-226. We interpret the Railway Labor Act as conferring exclusive jurisdiction on the Adjustment Board to decide this question and hence conclude that the determination of this issue is not within the jurisdiction of the District Court.[29] The Electricians, however, contend that the issue should be judicially determined. Were we to do so on the record and arguments here presented we would agree with the general result reached by the trial court but we believe that neither the parties nor the court have articulated precisely the proper interpretation to be given to the incidental work rule as implemented by the Act and to the identical rule in the Carmen's agreement, as applied to the facts of this case.

The Electricians contend that the application of the incidental work rule should be restricted *completely* to the

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one volume: *Hearings on H.J. Res. 1112 and H.J. Res. 1124 Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., Ser. No. 91-47 (1970) (hereafter cited as *House Hearings*). The Senate hearing of March 4, 1970 was separately published as *Hearing on S.J. Res. 178 Before the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. (1970) (hereafter cited as *Senate Hearing* I). A second Senate hearing conducted on April 2, 1970 was separately published under exactly the same title as the first (hereafter cited as *Senate Hearing* II). Separate reports were published for each of the Laws that were subsequently passed: the reports covering Pub. L. 91-203 are S. REP. No. 91-717, 91st Cong., 2d Sess. (1970), and H.R. REP. No. 91-868 91st Cong., 2d Sess. (1970); and the reports behind Pub. L. 91-226 are S. REP. No. 91-758, 91st Cong., 2d Sess. (1970), and H.R. REP. No. 91-984, 91st Cong., 2d Sess. (1970). The floor debates accompanying passage of Pub. L. 91-226 may be found at 116 CONG. REC. 10717-31 (House), 10775-81 (Senate) (1970).

[29] Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, 244 (1950); Order of Conductors v. Pitney, 326 U.S. 561 (1946).

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four signatory unions that initialed the original Memorandum because, they argue, it is part of Public Law 91-226 that was intended only to settle a labor dispute between the four unions and the carriers. We believe, however, that this is too narrow a view of the rule as implemented by the Act. We recognize that the Act covers the four signatory unions completely, but we also consider that the provisions of the Memorandum of Agreement as originally initialed by the unions, and as implemented by congressional action, were intended to apply in some instances to the entire working relations of these four unions with the carriers and thus necessarily encompassed some of the working relations of the four signatory unions with the other shop crafts, and possibly others.

Under the operative provision of the "incidental work rule," as implemented by Congress, the four signatory crafts are deemed to have agreed that a

> mechanic of a craft . . . may be required, so far as they are capable, to perform . . . incidental work . . . covered by the classification of work rules of another craft or crafts . . . at running repair stations . . . (Not in sequence.)

By these provisions the negotiators for the four shop craft unions agreed upon broad language that encompasses work situations involving "mechanics" and "crafts" generally and not just those "mechanics" and "crafts" who belonged to the four unions that initialed the original Memorandum. When this language was formulated by the parties in the original Memorandum neither side had any idea that an attempt would be made to restrict its application because it subsequently became involved in the settlement of a strike by the four participating unions. When the rule was first drafted (and its terminology has not been changed since) the parties contemplated a normal application of the rule to the normal operations of the railroad.

Had the parties desired to limit the operation of the Memorandum to the bargaining "crafts," they could have easily done so by specific language. Failing to do so, the clear implication is that they did not intend their general provisions to be so restricted. There is thus nothing in the language of the agreement to restrict the meaning of "mechanic" or "craft" to members of the four shop craft unions that initialed the original Memorandum or to restrict the incidental work that can be compelled at running repair stations only to work of the four signatory crafts. The language used makes the rule a "two-way street" applicable to any person or incidental work that satisfies the "mechanic" and "craft" requirements. It would thus encompass incidental work of both the Electricians and the Carmen, which is the sole issue presented to this court.

In its argument the Electricians overly emphasize the fact that the Act was passed to stop a strike involving the four unions only and they generally ignore the plain meaning of the words used in the Memorandum. In our view, Public Law 91-226 only operates *compulsively* on the four signatory craft unions. By this we mean that only the four signatory unions could be *compelled* because of Public Law 91-226 to perform incidental work of other crafts and to allow other crafts to perform incidental work in their craft. However, the clear intent of the language used in the incidental work rule, to the exent that it was implemented by Public Law 91-226, requires personnel of the four signatory unions at running repair stations to perform incidental work in *all* the shop "crafts" and also requires them to allow *all* the shop "crafts" to perform incidental work in their "craft."

Conversely stated, the Understanding which the Act

implements does not operate to *compel* personnel of the two non-signatory shop craft unions to perform incidental work in the other crafts or to compel the non-signatory unions to accede to other crafts performing incidental work in their craft. This interpretation is fortified by the fact that the carriers and the Carmen did voluntarily agree on an identical rule shortly after the passage of the Act. If the Act had covered all shop crafts *compulsory* there would have been no necessity for the railroads to sign a separate agreement with the Carmen. Thus, prior to the time that the Carmen agreed to the incidental work rule, they were free to object to the other four shop crafts doing work in their craft under the incidental work rule as implemented by the Act and the Carmen could not be compelled to perform incidental work in the other crafts. But, when the Carmen signed the agreement containing an identical "incidental work rule" they placed themselves in the same position as the four signatory unions, without in any way changing the situation of the earlier signatory unions except that thereafter when the personnel of the original four signatory unions performed incidental work in the Carmen's craft, they would be doing incidental work that the Carmen had agreed they could do. In our view this is the plain meaning of the "incidental work rule" in Public Law 91-226 and the Carmen's agreement as applied to the Electricians and the Carmen.

So were we to construe the legislation and the Carmen's agreement we would reach the same result as the trial court. However, when Congress provided that the "Memorandum . . . shall have the same effect . . . as though arrived at by *agreement* of the parties under the Railway Labor Act" (P.L. 91-226), it obviously intended that jurisdiction to interpret the provisions of that Memorandum of Agreement would be in the Adjustment Board as with other "disputes . . . growing out of . . . the interpretation or application of agreements . . ." 45 U.S.C. § 531

(i). Thus, in our opinion this phase of the dispute is a matter for the Adjustment Board and they are free to adopt a different approach. The parties may seek to support their particular interpretation by evidence as to usage, practice and custom and the Adjustment Board is peculiarly fitted and specifically designated to deal with such matters. [30]

This brings us to the body of doctrine developed under the Act in order to determine whether the Company's use of Carmen to perform incidental electrical work constitutes a "unilateral change in major conditions of employment," as contended by the Electricians.

IV

The first reason given by the District Court for concluding that the Electricians were unlikely to succeed on the merits was

> 1. That the defendant's implementation of the "incidental work rule" contained in the Memorandum of Understanding of December 4, 1969, as implemented by Public Law 91-226, and the plaintiff's challenge thereto does not involve a change in an agreement, but instead involves a question of the interpretation and application of an existing agreement covering rates of pay, rules and working conditions.

This is tantamount to saying that this is a minor as contrasted with a major dispute and therefore one which is properly cognizable by the Adjustment Board. App. 74.

The Railway Labor Act, as amended in 1934, created two independent procedures for resolution of disputes between carriers and the labor organizations representing their employees. Under the procedure initiated by a section 6 notice, summarizd in note 6, *supra*, negotiations proceed through the Mediation Board and if necessary an

[30] Order of Conductors v. Pitney, *supra* note 29, 326 U.S. at 567.

Emergency Board, and may ultimately result in economic self-help. The alternative procedure, under section 3, leads to a final and binding determination of the dispute by the Adjustment Board.

This difference in treatment under the two procedures is dramatic, so that much litigation has evolved out of the attempt to distinguish between the types of disputes which are to be handled under each procedure. The leading case on this point is *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), where the Court distinguished the two procedures as follows:

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case . . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.
>
> In general, the difference is between what are regarded traditionally as the *major* and the *minor* disputes of the railway labor world. . . . 325 U.S. at 723. (Emphasis added.)

The difference between major and minor disputes[21] is important not only for the differing statutory procedures for ultimate resolution, but also for the differing ap-

[21] 48 Am. Jur. 2d *Labor and Labor Relations* §§ 1485, 1486 (1970).

proaches to interim relief pending that ultimate resolution. The major disputes procedure is marked at every stage by provisions for maintenance of the status quo pending ultimate agreement. Because of these provisions for preserving the status quo the federal courts may enjoin carriers from implementing changes until the statutory procedures have been exhausted.[32] Indeed, the Supreme Court has noted that

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969). What makes these provisions so effective is the intentionally near-interminable procedures for resolving major disputes: "[T]he procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966).

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[32] *See, e.g.*, Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142 (1969); Illinois Cent. R.R. v. Brotherhood of Locomotive Eng'rs, 422 F.2d 593 (7th Cir. 1970)); Southern Ry. v. Brotherhood of Locomotive Firemen, 119 U.S.App.D.C. 91, 337 F.2d 127 (1964).

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> |O|n the other hand, minor disputes are expected to affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so.

Elgin, J. & E. Ry. v. Burley, supra, 325 U.S. at 724. Accordingly, the procedures for settling minor disputes are much shorter and simpler, and there are no equivalent status quo provisions.

The Congress having vested jurisdiction to resolve railway labor disputes in specialized administrative bodies, *e.g.*, the Mediation and the Adjustment Boards, courts have been reluctant to intervene. Where judicial intervention has been necessary to protect fundamental interests under the Act, it has been authorized,[33] but the more common practice in minor disputes has been to deny judicial intervention through enforcement of equitable remedies in deference to the operation and decisions of the Adjustment Board.[34]

The availability of equitable relief to judicially forestall actions taken by either the carriers or the labor organizations thus will often depend on the characterization of the dispute between the parties as a major or minor one. Such is the case here, for if the District Court were to conclude on the merits that the Company's action constitutes a unilateral change in major conditions of employment—making the dispute a major one—the Electricians would be entitled to injunctive relief under the status quo provisions of the Act. If, however, the dispute is characterized as minor, then the injunction may properly be denied un-

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[33] The leading cases are Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937); and Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930).

[34] *See, e.g.*, Slocum v. Delaware, L. & W. R.R., *supra* note 29; Order of Conductors v. Pitney, *supra note* 29.

less irreparable injury is shown separately.[35] This distinction between major and minor disputes and the District Court's conclusion that the present dispute is a minor one, is the legal premise which we are reviewing here under the principles enunciated in *Delaware & H.Ry.*[36]

The purpose and effect of Public Law 91-226 was to convert the December 4, 1969 Memorandum of Understanding between the negotiators into the equivalent of a contract agreement governed by the same principles as any other agreement reached under the procedures of the Railway Labor Act. Thus, while it may be said that the whole situation is the result of a statute and we are interpreting a statute, still Congress has directed that it be handled as an "agreement" and in our opinion this "statute" has the effect of conferring jurisdiction on the Adjustment Board when the interpretation of that "agreement" involves a minor dispute. So whether a statute or an agreement is involved the Adjustment Board has jurisdiction of a minor dispute therein. Accordingly, we must determine under the Supreme Court's *Elgin* standards whether the dispute over use of Carmen to perform incidental electrical work

> arise[s] where there is no . . . agreement or where it is sought to change the terms of one . . . [or whether] [t]he dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation . . . . 325 U.S. 723.

Predictably, the Electricians here contend that by extending the incidental work rule imposed by Public Law 91-226 to the Carmen, who originally were not parties to that dispute, the Company was unilaterally changing the

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[35] Order of Conductors v. Pitney, *supra* note 29, 326 U.S. at 567.

[36] Delaware & H. Ry. v. United Transp. Union, 146 U.S. App.D.C. 142, 158-61, 450 F.2d 603, 619-22 (1971). *See* Part II of this opinion, *supra*.

terms and conditions of employment prescribed in that "contract." Equally predictably, the Company contends that all that is at issue is the meaning or application of the phrases "mechanic or mechanics of a craft or crafts" and "covered by the classification of work rules of another craft or crafts" as those phrases are used in the "contract." In similar circumstances the Ninth Circuit stated:

> It is true, as the union points out, that a controversy, although couched in terms of a disagreement as to interpretation of a contract may under some circumstances be regarded as a major dispute. This result may be reached if it can be said that the change being imposed by one side on the other *is in no wise contemplated or arguably covered by the agreement.* The provisions of the Railway Labor Act may not be avoided merely through the device of unilateral action which the actor purposefully intends shall not become a part of the agreement. The major-minor dispute dichotomy does not relate to artfully contrived formalistic demands or responses, but to matters of substance. . . .
>
> But where the position of one or both of the parties *is expressly and arguably predicated on the terms* of the agreement, as illuminated by long-standing practices, the question of whether the position is well taken involves a minor dispute.

Switchmen's Union v. Southern Pac. Co., 398 F.2d 443, 447 (9th Cir. 1968) (emphasis added; citations omitted).

The proper judicial test of a minor dispute is thus a narrow one, for as Chief Judge Matthes of the Eighth Circuit has recently pointed out,[37] the Act vested exclusive

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[37] It is clear, however, that the line between changes in working conditions which are or are not allowed by a contract is very thin and therefore any attempt by a court to make a definitive resolution of this question would tread upon the exclusive jurisdiction of the adjustment agencies. United Transp. Union v. Burlington Northern, 458 F.2d 354, 357 (8th Cir. 1972).

jurisdiction over resolution of such disputes in the Adjustment Board, and where the dispute is even arguably a minor one that administrative body should have the first opportunity to evaluate and decide it.

> [T]he test to be applied is that if the contract is reasonably susceptible to the interpretations sought by both the carrier and union, the dispute is minor and within exclusive adjustment jurisdiction. . . . *Only if . . . . the contract were not reasonably susceptible to the carrier's contention would this be a § 6 dispute proper for a "status quo" injunction.*

United Transp. Union v. Burlington Northern, supra note 34, slip op. at 6 (emphasis added; citations omitted).

Applying these tests to the present dispute we find ample support for the District Court's conclusion that this is a minor dispute suitable for resolution by the Adjustment Board. To begin, the contention of the Company is "expressly and arguably predicated on the terms of the agreement," *i.e.*, the Memorandum of Understanding. The Memorandum refers to "mechanics" and "crafts" without any words of limitation that would narrow these terms to the four parties to the negotiations who tentatively initialed the Memorandum. Furthermore, the "long-standing practice" was for all six of the shop craft unions to bargain together or at the very least to bargain for substantially identical contracts.[38] It is certainly arguable, then, that the rule authorizes performance of incidental work in any of the six shop "craft" unions here involved by any of the

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[38] Indeed, the basic agreement between the parties to this dispute, to which the contract in question is merely the periodic up-dating and revising of terms, was between the Washington Terminal Company and Railway Employees' Department, System Federation No. 106 (composed of IBEW, IAM, IBBB, SMWI *and* the Carmen). App. 38. We have previously noted that shortly after Pub. L. 91-226 was enacted the Carmen signed a national agreement containing an incidental work rule identical to the one involved here.

"mechanics" whose unions are bound by the incidental work rule either by contract or by Public Law 91-226. This encompasses both the Electricians and the Carmen and the work of their crafts.

We also believe that the possibility that mechanics in other crafts might be brought within the scope of the incidental work rule through subsequent agreements containing similar rules was clearly within the contemplation of the parties. When proposals were being considered in Congress for implementing the Memorandum of Understanding for the three ratifying unions and leaving the Sheet Metal Workers to some form of arbitration or continuing negotiation, the question was raised about implementation of the incidental work rule. Mr. Winpisinger, vice president of the Machinist's Union, expressed his view as follows:

> Mr. WINPISINGER. I don't think the fact should be ignored that there is a substantial interplay under this rule as between the three of the organizations who propose to sign the agreement. Incidental work does not affect only the Sheet Metal Workers. It affects all of our organizations. Their would be an interplay as between the three of us if it were in effect at this point. Obviously, it is contemplated I think from the Sheet Metal Workers' proposal that they would not be bound by the rule, and therefore interplay [between the other three crafts and the Sheet Metal Workers] would be held at least in limbo until the arbitration came down and we found out whether or not they were party to the rule and whether they were bound by that rule. [39]

From this it is at least arguable, then, that once the four unions were bound by the rule, interplay between them and a fifth might be accomplished by having that fifth union agree to the same identical rule. This conclusion is forti-

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[39] *Senate Hearing II, supra note* 28, at 114.

fied by the language of the incidental work rule being in nowise restrictive as to "mechanics" or "craft."

There is additional testimony in the congressional hearings that demonstrates this was precisely what the carriers had intended to do and that the unions had advance notice of such intention. Mr. John W. O'Brien, General Vice President of the Sheet Metal Workers, and their principal spokesman in this dispute, testified before the congressional committee that it had been his understanding that the negotiations related solely to the locomotive departments of the railroads. [40] He contended that in the February 1970 bargaining sessions Mr. Hiltz (representing the carriers) revealed for the first tin e the railroads' intent to expand the rule: [41]

> During the week of February 8, about February 12, in response to a union offer, Mr. Hiltz told Assistant Secretary [of Labor] Usery that the rail bargainers and management would extend the incidental work rule proposed to cover all running repairs in all departments, including passenger, freight departments, et cetera.
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> * * * * * *
>
> He said—Mr. Hiltz, I am talking about—"This is to apply to all running repairs."
>
> The question was asked, "What about Mr. George O'Brien's union, the carmen, they are not party to this."
>
> He said, "I intend to discuss this with Mr. O'Brien and have it apply to him, too"—I guess write the same rule.

Mr. Hiltz in subsequent testimony denied the element of surprise and explained the basis of the carriers' contention: [42]

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[40] *Id.* at 44 (prepared remarks); *Senate Hearings I, supra* note 28 at 83.

[41] *House Hearings, supra* note 28, at 119.

[42] *Id.* at 232-33.

> This rule was written by the unions in the handwriting of one of the union negotiators. Mr. O'Brien was there when this rule was presented to us—and [as] subsequently accepted by management reads, and I will quote: "At running repair work locations which are not designated as outlying points where," et cetera, et cetera.
>
> It does not say at running repair work locations where locomotives are repaired or where doodlebugs are repaired or anything else. It says at running repair work locations.
>
> This language does not even suggest that this work is restricted to locomotive repairs inasmuch as running repairs are performed on all types of equipment on which these unions do work.

We, of course, need not resolve this question—that is the task solely of the Adjustment Board once we determine, as we have, that this exchange and our interpretation of Public Law 91-226 and the Agreement with the Carmen wholly prevents us from finding that the contention of the carriers here was "in nowise contemplated or arguably covered by the agreement." On the contrary, the agreement was "reasonably susceptible" of the carriers' approach.

One further factor enters into our analysis of whether the Company's position on this appeal was reasonably within the contemplation of the parties to this agreement. If there were a significant difference in either the skill- or pay-level of the carmen from the other four unions, a very plausible argument could be made that the original four would never accede to an agreement bringing the carmen within the scope of the rule. If the carmen were low-skill or low-pay employees, the carriers would have a strong incentive to replace the more expensive mechanics with carmen. In such a situation the low-pay union would be eager to sign the additional agreement because they could envision more work for their membership; the other

four, however, would be vehemently opposed to participation of the low-pay union within the scope of the rule because their jobs would be directly threatened. If all five unions received approximately the same wages, then the only incentive for the carriers to use one union's men to perform incidental work in another union's craft is to improve the overall efficiency of the shop. In this situation, there would be no strong economic incentive either for the carmen to join the agreement or for the other four to oppose their participation.

One could argue that the Electricians' opposition to the Carmen in this case results from such economic factors and demonstrates that the interplay between the Carmen and the others was not within the contemplation of the other four when proposing the incidental work rule. We find evidence in the record here, however, to refute such a position. When the February 1970 negotiations were stalled by the adamant opposition of the Sheet Metal Workers, the other three unions, *including the appellant*, the Electricians offered to break the deadlock by replacing the Sheet Metal Workers with the Carmen in the Agreement. This demonstrated willingness to participate in an incidental work rule with the Carmen wholly undercuts the Electricians' present arguments—at least to the extent necessary for us to find that this is a minor dispute that should go to the Adjustment Board for ultimate resolution.

V

We do not in any way intend to suggest an opinion as to whether or not the Company should be permitted to employ carmen to perform incidental work in the other four unions' crafts. Our task, as was the District Court's, is the much narrower one of determining whether the work rules implemented by Public Law 91-226 are reasonably susceptible to such an interpretation when coupled with

identical rules agreed to by the Carmen. We agree with the Eighth Circuit's expression of the proper legal premise to apply here:

> Only if . . . the contract were not reasonably susceptible to the carrier's contention would this be a § 6 dispute proper for a "status quo" injunction. [43]

We believe the action of the District Court in denying the preliminary injunction requested by the Electricians conforms to that premise, and we therefore affirm that order.

Judgment accordingly.

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[43] United Transp. Union v. Burlington Northern, *supra* note 37, 458 F.2d at 357.

APPENDIX

CHRONOLOGY

Nov. 8, 1968	IBEW, IAM, IBBB, & SMWI served § 6 notices on virtually all railroads requesting wage changes and suggesting national handling if local settlements could not be reached.
Nov. 9, 1968	Railroads, including Washington Terminal, served § 6 notices on IBEW, IAM, IBBB, & SMWI proposing changes in work rules.
Mar. 17, 1969	Failing local agreements, national bargaining commenced between Employees Conference Committee and National Railway Labor Conference.
Apr. 10, 1969	Failing national agreement, parties jointly applied for services of National Mediation Board.
Aug. 19, 1969	Mediation Board requested parties to submit dispute to voluntary arbitration; unions refused.
Sept. 3, 1969	Mediation Board relinquished jurisdiction.
Sept. 3-Oct. 3, 1969	Unions announce intention to strike 7 carriers; carriers announce intention to lock-out nationally if anyone struck. Mediation Board informs the President of its failure to resolve the dispute.
Oct. 3, 1969	President convenes Emergency Board No. 176 to investigate the dispute.

Nov. 2, 1969	Unions refuse recommendations of Emergency Board and Board reports to the President its failure to resolve dispute. Negotiations continue, however, under the auspices of the Department of Labor.
Dec. 4, 1969	The Memorandum of Understanding initialed by all parties to the negotiation.
Dec. 17, 1969	Results of ratification vote announced; membership of SMWI rejected the agreement.
Jan. 31, 1970	Unions struck Union Pacific; carriers announced nationwide lockout; District Court for D.C. issued TRO against both actions.
Jan. 31-Mar. 2, 1970	Negotiations continue under Department of Labor mediation and TRO voluntarily extended to Feb. 20 when argument scheduled on preliminary injunctions. Following argument TRO extended to Mar. 2.
Feb. 18, 1970	IBEW, IAM, IBBB offer to sign agreement without SMWI, or, in the alternative, with Carmen replacing SMWI. Carriers reject both offers.
Mar. 2, 1970	District Court enters injunction against selective strikes: *IAM v. Nat'l Ry. Labor Conf.*, 310 F. Supp. 905 (D.D.C. 1970), *vacated & dismissed as moot sub nom. Alton & S. Ry. v. IAM*,——U.S.App.D.C.——, 463 F.2d 872 (1972).

Mar. 3, 1970	Unions announce national strike for midnight Mar. 4. President requests emergency legislation from Congress placing into effect the Dec. 4 Memorandum as the agreement between the parties.
Mar. 4, 1970	Hearings held in House and Senate on President's proposal. Pub. L. 91-203, 84 Stat. 22, enacted freezing the situation and preventing any strike or lockout prior to Apr. 11.
Mar. 4-Apr. 9, 1970	Further negotiations held between parties; further hearings held in House and Senate.
Apr. 9, 1970	Pub. L. 91-226 enacted, placing the Dec. 4 Memorandum of Understanding into effect as the agreement between the parties.
Apr. 24, 1970	Effective date of national agreement between the railroads and the Carmen's union.
May 1, 1970	IBEW representative at Washington Terminal filed time claim for incidental electrical work performed by member of Carmen's union.
May 28, 1970	Washington Terminal rejected time claim filed by IBEW.
May 29, 1970	IBEW served letter on Washington Terminal claiming the assignment of incidental work to Carmen constituted a "major" dispute and IBEW would strike if the practice were not

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	stopped. Company agreed to temporary cessation pending a meeting of national bargaining representatives scheduled for July 8.
June 26, 1970	IBEW announced its intention to strike the Southern Pacific on June 29 on precisely the same issue.
June 29, 1970	TRO issued against IBEW preventing strike against Southern Pacific.
July 8, 1970	National meeting achieved no meaningful agreement.
July 9, 1970	U.S. District Court for Eastern District of California issued preliminary injunction against IBEW strike on Southern Pacific, holding that the dispute was "minor" and conditioning injunction on Southern Pacific's submission thereof to the National Railroad Adjustment Board.
July 31, 1970	IBEW filed counterclaim in Southern Pacific litigation that was virtually verbatim with the present litigation in instant case.
Aug. 7, 1970	Washington Terminal informed local IBEW of the Southern Pacific litigation and announced its intention to resume assignments of incidental work to carmen.
Sept. 15, 1970	IBEW filed instant suit.
Sept. 29, 1970	District Court denied IBEW's motion for TRO in instant case.

Oct. 5, 1970	The District Court in California denied IBEW's request for injunction from the bench, holding the dispute to be minor.
Oct. 6, 1970	District Court here denied IBEW's request for preliminary injunction from the bench.
Oct. 19, 1970	District Court in instant case filed written findings of fact, conclusions of law and order.

APPENDIX B

Judgment of the Court of Appeals

(Decided December 19, 1972)

No. 24,880

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
Appellant,

v.

WASHINGTON TERMINAL COMPANY

Appeal from the United States District Court
for the District of Columbia

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

APPENDIX C

Findings, Conclusions and Order of District Court

(Filed October 19, 1970)

Civil Action No. 2727-70

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Plaintiff,

vs.

WASHINGTON TERMINAL COMPANY,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Upon consideration of the Motion of plaintiff for a Preliminary Injunction and the Opposition of the defendant thereto, and upon further consideration of the record and file in this cause, including the various affidavits and exhibits, together with the arguments of counsel in open Court, the Court hereby makes the following:

FINDINGS OF FACT

1. That the defendant's implementation of the "incidental work rule" contained in the Memorandum of Understanding of December 4, 1969, as implemented by Public Law 91-226, and the plaintiff's challenge thereto does not involve a change in an agreement, but instead involves a question of the interpretation and application of

an existing agreement covering rates of pay, rules and working conditions:

2. That the plaintiff has an adequate administrative remedy for the resolution of the issue raised herein pursuant to the provisions of the Railway Labor Act, 45 U.S.C. §151, *et seq.*, and more particularly pursuant to 45 U.S.C. §153 First (i). In this respect, the Court finds that the National Railroad Adjustment Board would be particularly qualified to handle a dispute of the type involved herein.

3. That assuming *arguendo* that the question of coverage of the Memorandum of Understanding, implemented by Public Law 91-226, was a proper one for construction by the Court, it would appear that the Court would find that the intent of the Congress assumed a broad coverage of the same, as opposed to a limited application to only those several shop craft unions involved in the negotiations culminating in said Memorandum of Understanding.

4. That in related litigation, the United States District Court for the Eastern District of California (in *Southern Pacific Transportation Company v. International Brotherhood of Electrical Workers, et al.* Civil No. S-1699) has found the dispute to involve the interpretation and application of an existing agreement, and ordered the dispute submitted to the National Railway Adjustment Board, which has been done by the carrier in that case.

5. That by virtue of the foregoing, plaintiff has failed to show a probable likelihood of ultimate success in this litigation.

CONCLUSIONS OF LAW

1. That the issue presented herein constitutes a "minor dispute" within the meaning of the Railway Labor Act, 45 U.S.C. §151, *et seq.*, which provides an appropriate and exclusive forum for the resolution thereof.

2. That plaintiff has failed to make the requisite showing that would entitle it to the extraordinary relief which it seeks.

ORDER

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is, by the Court, this 19 day of October, 1970,

ORDERED, that the Motion of the plaintiff for a Preliminary Injunction be, and the same is hereby denied.

/s/ JOHN H. PRATT
Judge

APPENDIX D

Public Law 91-226; 84 Stat. 118

[S. J. Res. 190]

Joint Resolution to provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees.

WHEREAS the labor dispute between the carriers represented by the National Railway Labor Conference and certain of their employees represented by the International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers' International Association; International Brotherhood of Electrical Workers functioning through the Employees' Conference Committee, labor organizations, threatens essential transportation services of the Nation; and

WHEREAS all the procedures for resolving such dispute under the Railway Labor Act have been exhausted; and

WHEREAS the representatives of all parties to this dispute reached agreement on all outstanding issues and entered into a memorandum of understanding, dated December 4, 1969; and

WHEREAS the terms of the memorandum of understanding, dated December 4, 1969, were ratified by the overwhelming majority of all employees voting and by a majority of employees in three out of the four labor organizations party to the dispute; and

WHEREAS the failure of ratification resulted from the concern of a relatively small group of workers concerning the impact of one provision of the agreement; and

WHEREAS this failure of ratification has resulted in a threatened nationwide cessation of essential rail transportation services; and

WHEREAS the memorandum of understanding, dated December 4, 1969, permits the service of notices or proposals for changes under the Railway Labor Act on September 1, 1970, to become effective on or after January 1, 1971; and

WHEREAS the national interest, including the national health and defense, requires that transportation services essential to interstate commerce is maintained; and

WHEREAS the Congress finds that an emergency measure is essential to security and continuity of transportation services: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The memorandum of understanding, dated December 4, 1969, shall have the same effect (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.) and that February 19, 1970, shall be deemed the "date of notification of ratification" as used in this memorandum of understanding.

Approved April 9, 1970.

Excerpts from the Railway Labor Act.

Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.)

General Purposes

Section 2. The purposes of the act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respec-

tively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in any effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to

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prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carriers, its officers, or agents shall change the rates of pay, rules, or working conditions of

its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exer-

cised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation of the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an